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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 177.

THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

GEORGE BOHON, ADMINISTRATOR OF EDWARD COOK, DECEASED, AND FRED MILLIGAN.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

FILED FEBRUARY 13, 1905.

(19,629.)

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Volume No. 1.

Transcript.

CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC Railway Co., Appellant,
vs.
EDWARD COOK'S ADMINISTRATOR, Appellee.
} Appeal from Mercer Circuit Court.

1 Pleas before the honorable, the court of appeals of Kentucky, at the capital in the city of Frankfort on the twenty-second day of March, 1902.

CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC Railway Co., Appellant,
vs.
EDWARD COOK'S ADMINISTRATOR, Appellee.
} Appeal from Mercer Circuit Court.

Be it remembered that heretofore, to-wit: on the 26th day of August, 1901, the appellant by its attorneys filed in the clerk's office of the court of appeals a transcript of record, in words and figures as follows, to-wit:

Pleas before the honorable M. C. Saufley, judge of the Mercer circuit court, at the court house in Harrodsburg, Ky., on Saturday, the 25th day of May, 1901.

Be it remembered that heretofore, to-wit: the plaintiff by his attorney filed with the clerk of the Mercer circuit court on the 23rd day of February, 1901, his petition in words and figures as follows, to-wit:

Which petition is as follows:

Petition.

Mercer Circuit Court.

GEORGE BOHON, Adm'r of Edward Cook, Dec'd, Plaintiff,
vs.
CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY Company, Fred Milligan, Defendants.
} Petition.

The plaintiff, George Bohon, administrator of Edward Cook, deceased, states that on the — day of ——, 1901, he was by order of the Mercer county court duly and regularly appointed administrator of Edward Cook, deceased, who died in said county of Mercer on the — day of ——, 1901, intestate, as hereinafter stated, and at the time of his death was a citizen and resident of said county.

Plaintiff avers that he executed bond with surety approved
3 by the said court as administrator aforesaid, and took the oath required by law, and entered upon his duties as such administrator.

Plaintiff avers that the defendant The Cincinnati, New Orleans & Texas Pacific Railway Company is a common carrier and corporation engaged in operating under a lease from the owners thereof a railroad, a portion of which lies within and runs through Mercer county, Kentucky, and the defendant Fred Milligan is a citizen and resident of Mercer county, Kentucky.

Plaintiff avers that on the — day of ——, 1901, his intestate Edward Cook was a brakeman and switchman in the employment of the defendant The Cincinnati, New Orleans & Texas Pacific Railway Company, and engaged as such brakeman and switchman for the defendant in discharging his duties to said defendant in its yard at Burgin, Mercer county, Kentucky.

Plaintiff avers that on the said — day of ——, 1901, his intestate, Edward Cook, as brakeman and switchman aforesaid, for defendant Cincinnati, New Orleans & Texas Pacific Railway Company,
4 was engaged in said yard uncoupling and giving attention to defendant's cars for said defendant, which cars were in said defendant's train with engine attached to move and guide same, and the defendant Fred Milligan was at the time in the employment of said defendant company as engineer and engaged in managing, operating and controlling said train and engine for said defendant company, and while plaintiff's intestate was engaged as aforesaid on said date, the defendant Cincinnati, New Orleans & Texas Pacific Railway Company and the defendant Fred Milligan, caught and crushed said Cook's body between the cars of said train by and through the gross carelessness and negligence of said Milligan as engineer of said defendant company in the management, movement and operation of its said engine and train at said time and place for said defendant company, thereby so injuring him that he died within a few minutes thereafter, and when so caught and crushed said Cook was engaged in discharging his duties as said brakeman to said defendant company; and said death of said Cook was caused as aforesaid by the gross carelessness and negligence of the defendants, The Cincinnati, New Orleans and Texas Pacific Rail-
5 way Company and Fred Milligan, and plaintiff has been damaged thereby in the sum of thirty thousand dollars ($30,000).

Wherefore, plaintiff prays judgment against the defendants, The Cincinnati, New Orleans & Texas Pacific Railway Company and Fred Milligan, for $30,000 in damages, and his cost herein expended and for all proper relief.

HARDIN & HARDIN,
ROBERT HARDING,
Attorneys for Plaintiff.

Endorsed: 1901, Feb'y 23rd, filed. Ben C. Allin, clerk.

Upon which petition summons issued, dated the 23rd day of February, 1901, directed to the jailer of Mercer county, and the following return made by said jailer:

Summons.

"Executed the within summons by delivering a true copy to Howard King, the chief agent for the county of Mercer, State of Kentucky, for the Cincinnati, New Orleans & Texas Pacific Railway Company, on March 1st, 1901, and by delivering a true copy of within
6 summons to Fred Milligan on the 23rd day of February, 1901.

D. B. CHATHAM,
Jailer of Mercer County, Ky.

And then at the May term of said court, to-wit: May 13th, 1901, the following order was entered herein:

EDWARD COOK'S ADM'R, Pl'ff,
v.
C. N. O. & T. P. R'Y Co., &c., Def't.

Defendants filed petition and bond for removal of this cause to the United States circuit court of Ky., April 11th, 1901, now noted of record.

Said petition is as follows:

Petition for Removal.

Mercer Circuit Court.

GEORGE BOHON, Administrator of Edward Cook, Deceased, Plaintiff,
vs.
THE CINCINNATI, NEW ORLEANS & TEXAS Pacific Railway Company, a Corporation, and Fred Milligin, Defendants.
} Petition for Removal.

To the honorable the judge of the Mercer circuit court:

7 Your petitioner, The Cincinnati, New Orleans & Texas Pacific Railway Company, says it is a defendant in the above entitled suit; that the matter and amount in dispute in said action involves, exclusive of interest and costs, an amount to exceed the sum or value of $2,000.00; that said suit is a civil action to recover $30,000.00 damages for the alleged wrongful death of plaintiff's decedent, Edward Cook, through the alleged negligence of the defendant Fred Milligin, as engineer of this petitioner, in the management, movement and operation of an engine and train of your petitioner; that there is in said suit a controversy wholly between residents of

different States, which can be fully determined as between them, that is to say, between your petitioner, The Cincinnati, New Orleans & Texas Pacific Railway Company, defendant in said suit, who avers that at the commencement of said suit it was and still is a corporation organized under the laws of the State of Ohio, and of no other State, and that it was then and still is a resident and citizen of said State of Ohio, and of no other State, and that it was not then and is not now either a resident or citizen of the State of Kentucky, and the plaintiff, George Bohon, administrator of Edward Cook,
8 deceased, who was at the commencement of this suit and still is a resident and citizen of the State of Kentucky.

Your petitioner further says that in this suit said plaintiff has fraudulently and improperly joined, as a co-defendant, with your petitioner herein, one Fred Milligin, who is a citizen of the State of Kentucky, and your petitioner says that said Fred Milligin has been fraudulently and improperly joined as a co-defendant in this suit because of the fact that he is a resident of the State of Kentucky, and for the sole purpose of defeating the jurisdiction of the United States court.

Your petitioner offers herewith a bond with good and sufficient security thereto, conditioned according to law, for its entering into the United States circuit court for the district of Kentucky, being the proper district, on the first day of its next term, a copy of the record in this suit, and for the paying of all costs that may be awarded by said United States circuit court, if the court should hold that this suit was wrongfully or improperly removed thereto.

Your petitioner prays this honorable court to proceed no
9 further herein, except to make the order of removal required by law, and to approve said surety and bond, and to cause the record herein to be removed into said United States circuit court for the district of Kentucky, and it will ever pray.

THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY CO.,
By SIMRALL & GALVIN, Attorneys.

Endorsed: 1901, April 11th, filed. Ben C. Allin, clerk.

STATE OF OHIO, Hamilton County, } ss:

W. J. Murphy, being first duly sworn, says that he is the manager of the defendant The Cincinnati, New Orleans & Texas Pacific Railway Company, and the facts stated in the foregoing petition for removal are true, as he verily believes.

W. J. MURPHY.

Sworn to before me and signed in my presence, this 25th day of March, 1901.

[SEAL.] EUGENE BRUNSMAN,
Notary Public in and for Hamilton County, Ohio.

The bond above referred to is as follows:

10 Bond for Removal.

Mercer Circuit Court.

GEORGE BOHON, Administrator of Edward Cook, Deceased, Plaintiff,
vs.
THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC Railway Company, a Corporation, and Fred Milligin, Defendants.
} Bond for Removal.

Know all men by these presents: That the Cincinnati, New Orleans & Texas Pacific Railway Company, as principal, and John Galvin and C. D. Thompson and C. D. Thompson, as sureties, are held and firmly bound unto George Bohon, administrator of Edward Cook, deceased, in the penal sum of $500.00, the payment hereof well and truly to be made unto the said George Bohon, administrator of Edward Cook, deceased, his successors, heirs, representatives and assigns, jointly and severally by these presents.

The condition of this obligation is such that the said Cincinnati, New Orleans & Texas Pacific Railway Company, petitioner, shall enter in the United States circuit court for the district of Ken-
11 tucky on the first day of its next session a copy of the record in said suit of George Bohon, administrator of Edward Cook, deceased, against The Cincinnati, New Orleans & Texas Pacific Railway Company, pending in the Mercer circuit court, and shall well and truly pay all costs that may be awarded by said circuit court, if said circuit court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void, otherwise to remain in full force and effect.

Witness our hands this 27th day of March, 1901.

THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RY.,
By SIMRALL & GALVIN, Attorneys.
JOHN GALVIN.
C. D. THOMPSON.

Endorsed: April 11th, 1901, filed. Ben. C. Allin, clerk.

And then on another day of said term, to-wit: May 14th, 1901. the following order was entered herein:

EDWARD COOK'S ADM'R, Pl'ff,
v.
C. N. O. & T. R. RY. CO. &C., Def't.

The plaintiff filed herein demurrer and response to petition for removal and submitted on demurrer.

12 The demurrer and response above referred to are as follows:

Demurrer & Response.

Mercer Circuit Court.

GEORGE BOHON, Administrator of Edward Cook, Deceased, Plaintiff,
vs.
THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY Company, a Corporation, and Fred Milligin, Defendants.

The plaintiff, George Bohon, administrator of Edward Cook, deceased, demurs to the petition for removal of this cause to the United States court filed April 11, 1901, because the same does not state facts sufficient to authorize this court to remove this cause of action to the United States court.

Wherefore, &c.

HARDIN & HARDIN,
ROBERT HARDING,
Att'ys for Pl'ff.

13 The plaintiff not waiving his demurrer herein, but insisting on same, for answer to defendant-' petition for removal of this cause in the United States court, denies that there is in said suit a controversy wholly between residents of different States, and denies that in this suit plaintiff has fraudulently or improperly joined as co-defendant with the petitioner herein one Fred Milligin, and denies that said Fred Milligin has been fraudulently or improperly joined as a co-defendant in this suit, or for the sole purpose or any purpose of defeating the jurisdiction of the United States court.

Wherefore, the plaintiff prays the court for an order refusing to grant a removal of this cause to the United States court.

HARDING & HARDING,
ROBERT HARDING,
Att'ys for Plaintiff.

Endorsed: 1901, May 14th, filed. Ben C. Allin, clerk.

And then again on the same day of said term, to-wit: May 14th, 1901, the following order was entered herein:

14 EDWARD COOK'S ADM'R, Pl'ff,
v.
C. N. O. & T. P. RY. CO., &c., Def't.

This day came defendant- and executed bond for removal of this cause to the United States circuit court with C. D. Thompson, security, which bond is approved by the court.

And then on the same day of said term, to-wit: May 14th, 1901, the following order was entered herein:

EDWARD COOK'S ADM'R, Pl'ff,
v.
C. N. O. & T. P. RY. CO., Def't.

This cause having been submitted to the court upon the petition of the defendant The Cincinnati, New Orleans & Texas Pacific Railway Company for the removal of this said cause to the United States district court; and the court being advised, overrules the motion and petition of the defendants for said removal, to all of which the defendant Cincinnati, New Orleans & Texas Pacific Railway Company excepted and still excepts.

And then again on the same day of said term, to-wit: May 14th, 1901, the following order was entered herein:

15 EDWARD COOK'S ADM'R, Pl'ff,
v.
C. N. O. & T. P. RY. CO., &c., Def'ts.

The bond heretofore executed by the defendant Cincinnati, New Orleans & Texas Pacific Railway Company and filed with the petition for removal was this day presented by the defendant to the court for approval, and C. D. Thompson, the surety on said bond, appearing in open court acknowledged the execution by him of same, said bond is now approved. This order is made in lieu of the previous order entered on this day record showing that the bond was not executed until this day.

And then on another day of said term, to-wit: May 15th, 1901, the following order was entered herein:

EDWARD COOK'S ADM'R, Pl'ff,
v.
C. N. O. & T. P. RY. CO., &c., Def'ts.

By agreement of parties this action is set for trial on Wednesday, the 9th day of the present term.

And then on the same day of said term, to-wit: May 15th, 1901, the following order was entered herein:

16 EDWARD COOK'S ADM'R, Pl'ff,
v.
C. N. O. & T. P. RY. CO., &c., Def'ts.

The defendant F. Milligan by attorney filed herein his answer. Said answer is as follows:

Answer of Fred Milligan.

Mercer Circuit Court.

GEORGE BOHON, Administrator of Edward Cook, Deceased, Plaintiff,
vs.
CINCINNATI, NEW ORLEANS AND TEXAS Pacific Railway Co. and Fred Milligan, Defendant-. } Answer of Fred Milligan.

The defendant Fred Milligan for answer to the plaintiff's petition, denies that while operating or controlling said train or engine, he caught or crushed said Cook's body between the cars of said train by or through carelessness or negligence of himself as engineer of said company in the management, movement or operation of its said engine or train at said time or place, or that it thereby so injured the said Cook that he died within a few minutes thereafter.

17 He denies that the death of said Cook was caused by the gross carelessness or negligence of the defendant or through the carelessness or negligence of this defendant or of any carelessness or negligence of this defendant. He denies that the plaintiff has been damaged thereby in the sum of $30,000, or any sum.

Wherefore, he prays to be dismissed, for his cost and all proper relief.

Paragraph 2. Defendant re-affirming the allegations in the first paragraph, and still relying thereon, for further answer to the plaintiff's petition, says: that at the time of said accident the said Cook through his gross carelessness and negligence contributed to and caused the accident and injury complained of, and that but for the gross contributory negligence of the said Cook the said accident would not have occurred.

Wherefore, he prays to be dismissed, for his cost, and all proper relief.

GAITHER & VANARSDALL,
Att'y for Def't.

Endorsed: 1901, May 15th, filed. Ben C. Allin, clerk. By W. I. Allin, D. C.

18 And then again on the same day of same term, to-wit: May 15th, 1901, the following order was entered herein:

EDWARD COOK'S ADM'R., Pl'ff,
v.
C. N. O. & T. P. RY. CO., &c., Def'ts.

The defendant The Cincinnati, New Orleans & Texas Pacific Railway Company filed herein answer.

The answer referred to in the above order is as follows:

Answer of C. N. O. & T. P. Ry. Co.

Mercer Circuit Court.

GEORGE BOHON, Administrator of Edward Cook, Deceased, Plaintiff,
vs.
CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY Company and Fred Milligan, Defendant. } Answer.

The defendant, The Cincinnati, New Orleans & Texas Pacific Railway Company, for answer to the plaintiff's petition and
19 in bar to any proceedings of actions by this court in the said cause, states that on the 11th day of April, 1901, it filed in the clerk's office of this honorable court a petition for a removal of this said cause to the United States court, in which petition this defendant sought to have said cause removed into the United States circuit court, district of Kentucky, and that at the same time it filed a bond with John Galvin and C. D. Thompson as sureties in the sum of $500 for the due entry in the United States circuit court for the district court of Kentucky on the first day of its next session, a copy of the record in said suit of George Bohon, administrator of Edward Cook, deceased, *v.* The C. N. O. & T. P. Ry. Company, and for the payment of all costs that might be awarded by said circuit court if said court should hold that said suit was wrongfully or improperly removed thereto, and that the said bond so offered was duly approved by the honorable judge of this Mercer circuit court on the 14th day of May, 1901.

It says that by reason of said petition and bond having been filed by the defendant as required by law, before any other order or motion was made in said case, that this honorable court has
20 been divested of all jurisdiction in said case, and the defendant pleads said facts in bar of any further proceedings by this court in this cause.

Wherefore, &c.

Paragraph 2. The defendant without waiving its right to a removal of this cause to the United States circuit court, as prayed for, and still insisting that this court has now no jurisdiction in said cause, and for answer to plaintiff's petition, states: That it denies that it or the defendant Fred Milligan caught or crushed said Cook's body in the cars of said train by or through the gross or any carelessness or negligence of said Milligan as engineer of said defendant company in the management, movement or operation of its said engine or train at said time or place, for said defendant company, or that it thereby so injured him that he died in a few minutes thereafter, or when so caught or crushed said Cook was engaged in discharge of his duties as said brakeman for said company.

It denies that said death of said Cook was caused by the gross carelessness or any carelessness or negligence of the defendant Cincinnati, New Orleans & Texas Pacific Railway Company or Fred Milligan. It denies that plaintiff has been damaged in the sum of $30,000, or any sum.

21 Wherefore, it prays to be dismissed, and for all proper relief.

Paragraph 3. Defendant relying upon the allegations in the preceding paragraphs and making them a part of this paragraph, and for further and other answer herein, states that at the time of said accident the said Cook through his gross carelessness and negligence contributed to and caused the accident and injury complained of, and that but for the said gross contributory negligence of the said Cook, said accident and injury would not have occurred.

Wherefore, it prays to be dismissed, and for its cost and all proper relief.

GAITHER & VANARSDALL,
Att'ys for Def't.

Endorsed: 1901, May 15th, filed. Ben C. Allin, clerk. By W. I. Allin, D. C.

And then on another day of said term, to-wit: May 22nd, 1901, the following order was entered herein:

22 EDWARD COOK'S ADM'R, Pl'ff,
v.
C., N. O. & T. P. RY. CO., &C., Def'ts.

The plaintiff filed herein a demurrer to the first paragraph of the answer of defendant railway company, and being submitted on said demurrer, the same is sustained, to which said defendant excepts, and refusing to plead further, as to said first paragraph, the same is hereby dismissed, and by agreement of parties the affirmative allegations in separate answers of defendants are taken as controverted of record.

And then on the same day of said term, to-wit: May 22nd, 1901 the following order was entered herein:

EDWARD COOK'S ADM'R, Pl'ff,
v.
C., N. O. & T. P. RY. CO., &C., Def'ts.

This day came the parties, ordered that a jury come, and came B. M. Allin, I. C. Riker, Claud Britton, J. T. Ingram, Geo. W. Morris, W. T. Phillips, Daniel Barnett, F. V. Nelson, Ed Magoffin, Thos. Hudson, Varner Divine and Rob't Russell, who were empaneled and sworn according to law, but there not being time to conclude the

trial hereof on this day, said jury being charged by the court, were permitted to disperse until to-morrow morning at nine o'clock, until which time they are adjourned over.

22½ And then on another day of said term, to-wit: May 23rd, 1901, the following order was entered herein:

EDWARD COOK'S ADM'R, Pl'ff,
v.
C., N. O. & T. P. RY. CO., &c., Def't.

This day again came the parties, and the jury sworn herein on yesterday appeared and took their seats, and the taking of evidence resumed, but there not being time to conclude the trial hereof on this day, the jury being charged by the court are permitted to disperse until to-morrow morning at 9 o'clock, until which time they are adjourned over.

23 And then on another day of said term, to-wit: May 24th, 1901, the following order was entered herein:

EDWARD COOK'S ADM'R, Pl'ff,
v.
C., N. O. & T. P. RY. CO., &c., Def't.

This day again came the parties and the jury sworn herein on a former day of this term appeared and took their seats, and evidence being heard and the argument of counsel in part, but there not being time to conclude the trial hereof on this day, said jury being charged by the court, are permitted to disperse until to-morrow morning at 8½ o'clock. Until which time they are adjourned over.

And then on another day of said term to-wit: May 25th, 1901, the following order was entered herein:

Judgment.

EDWARD COOK'S ADM'R, Pl'ff,
v.
C., N. O. & T. P. RY. CO., &c., Def'ts.

This day again came the parties and the jury sworn herein on a former day of this term appeared and took their seats, and the argument of counsel being heard, said jury retired to consult of their verdict, and returned into court the following verdict, viz:

24 We, the jury, find for the plaintiff in the sum of $8,000, eight thousand dollars. B. M. Allin, foreman, J. T. Ingram, Claude

Britton, E. Magoffin, F. V. Nelson, Geo. W. Morris, W. T. Phillips, Varner Divine, Daniel Barnett."

It is therefore adjudged that the plaintiff, George Bohon, administrator of Edward Cook, deceased, recover of the defendants, Cincinnati, New Orleans and Texas Pacific Railway Company and Fred Milligan, the sum of eight thousand dollars so found by the verdict of the jury aforesaid, and his costs herein expended.

And then on another day of said term, to-wit: May 25th, 1901, the following order was entered herein:

EDWARD COOK'S ADM'R, Pl'ff,
v.
C., N. O. & T. P. RY. CO., &C., Def'ts.

This day came defendants and filed herein separate motions for judgment notwithstanding the verdict of the jury and submitted on said motions.

The motion of the defendant Cincinnati, New Orleans and Texas Pacific Railway Company above referred to is as follows:

25 Motion of C., N. O. & T. P. Ry. Co. for Judgment.

Mercer Circuit Court.

EDWARD COOK'S ADM'R, Plaintiff,
vs.
CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RY. CO., Defendants. } Motion for Judgment.

The defendant Cincinnati, New Orleans & Texas Pacific Railway Company comes and moves the court to enter a judgment herein for the defendant, notwithstanding the verdict of the jury.

GAITHER & VANARSDALL,
Att'ys for Def'ts.

(Endorsed:) 1901, May 25th, filed. Ben C. Allin, clerk.

The motion for judgment of Fred Milligan referred to in the above order is as follows:

Motion of Fred Milligan for Judgment.

Mercer Circuit Court.

EDWARD COOK'S ADM'R, Plaintiff,
vs.
CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, &C., Defendants. } Motion for Judgment.

26 The defendant Fred Milligan comes and moves the court to enter a judgment herein for the defendant notwithstanding the verdict of the jury.

GAITHER & VANARSDALL,
Att'ys for Def'ts.

Endorsed: 1901, May 25th, filed. Ben C. Allin, clerk.

And then on another day of said term, to wit: May 27th, 1901, the following order was entered herein:

EDWARD COOK'S ADM'R, Pl'ff,
v.
C. N. O. & T. P. RY. CO., Def'ts.

The defendants filed herein their separate motions and grounds for a new trial herein and submitted on same.

The motion and grounds for new trial of the Cincinnati, New Orleans & Texas Pacific Railway Company above referred to are as follows:

27 Motion & Grounds for New Trial of C., N. O. & T. P. Ry. Co

Mercer Circuit Court.

EDWARD COOK'S ADM'R, Plaintiff,
vs.
CINCINNATI, NEW ORLEANS & TEXAS PACIFIC Railway Company, &c., Defendant.
} Motion and Grounds for New Trial.

The defendant Cincinnati, New Orleans and Texas Pacific Railway Company comes and moves the court to set aside the verdict rendered herein and grant the defendant a new trial for the following reasons and grounds:

1st. Because of the error of the court in overruling defendant's petition for a transfer of this action to the Federal court.

2nd. Because the damages are excessive, and were given under the influence of passion or prejudice.

3rd. That the verdict is not sustained by sufficient evidence.

4th. That the verdict is contrary to law.

5th. That the court admitted, over the objection of the defendant, incompetent and irrelevant testimony, to which defendant excepted at the time.

28 6th. That the court refused to allow the introduction by the defendant of relevant and competent testimony, to which refusal the defendant excepted at the time.

7th. That the court refused the application of the defendant at the close of plaintiff's testimony to instruct the jury to find for the defendant, to which ruling the defendant at the time excepted.

8th. That the court refused to give proper instructions offered by the defendants, which refusal was excepted to at the time by the defendant.

9th. That the court improperly instructed the jury over the objections of the defendants, which was excepted to at the time by defendant.

GAITHER & VANARSDALL,
Att'ys for Def't.

Endorsed: 1901, May 27th, filed. Ben C. Allin, clerk.

The motion and grounds for a new trial of the *Cincinnati, New Orleans & Texas Pacific Railway Company* referred to in the above order is as follows:

29 Motion & Grounds for New Trial of Fred Milligan.

Mercer Circuit Court.

EDWARD COOK'S ADM'R, Plaintiff,
vs.
CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, Defendant.
} Motion and Grounds for New Trial.

The defendant Fred Milligan comes and moves the court to set aside the verdict herein and grant the defendant a new trial for the following reasons:

1st. Because the damages are excessive, and were given under the influence of passion or prejudice.

2nd. That the verdict is not sustained by sufficient evidence.

3rd. The verdict is contrary to law.

4th. That the court admitted over the objections of defendants incompetent and irrelevant testimony, to which the defendant excepted at the time.

5th. That the court refused to admit relevant and competent testimony offered by defendant, to which refusal the defendant excepted at the time.

30 6th. That the court refused the application of the defendant at the close of the plaintiff's testimony to instruct the jury to find for the defendant, to which refusal the defendant excepted at the time.

7th. That the court refused to properly instruct the jury, which refusal was excepted to by the defendant at the time.

8th. That the court improperly instructed the jury, over the objections of the defendants, which ruling was excepted to at the time by defendant.

GAITHER & VANARSDALL,
Att'ys for Def'ts.

Endorsed: 1901, May 27th, filed. Ben C. Allin, clerk.

And then on another day of said term the following order was entered herein, to-wit: May 29th, 1901:

EDWARD COOK'S ADM'R, Pl'ff,
v.
C., N. O. & T. P. RY. CO., &C., Def'ts.

31–45 The court upon consideration overrules the motions of defendants for a judgment notwithstanding the verdict of the jury herein, and also overrules the motions of the defend-

ants for a new trial herein, to all of which the defendants, The Cincinnati, New Orleans & Texas Pacific Railway Company and Fred Milligan, except, and pray an appeal to the court of appeals, which is granted.

And then on another day of said term, to-wit: June 5th, 1901, the following order was entered herein:

EDWARD COOK'S ADM'R, Pl'ff,
v.
C., N. O. & T. P. RY. Co., &c., Def'ts.

This day came defendants and tendered their bill of exceptions herein.

And then again on another day of said term, to-wit: June 8th, 1901, the following order was entered herein:

EDWARD COOK'S ADM'R, Pl'ff,
v.
C., N. O. & T. P. RY. Co., &c., Def'ts.

This day came the parties and the defendants having heretofore tendered to the court its bill of exceptions, and the same being examined and signed by the court, is ordered to be filed and made a part of the record, which is done.

* * * * * * *

46 And at a court of appeal held at the capitol at Frankfort on the 26th day of November, 1901, the following order was entered, to-wit:

C. N. O. & T. P. RY. Co.
v.
COOK'S ADM'R. } Mercer.

The court being sufficiently advised, the motion herein for oral argument is overruled.

Be it remembered that at a court of appeals held at the capitol at Frankfort on the 22nd day of March, 1902, the following judgment was entered, which is in words and figures as follows, to-wit:

Judgment of Ct. of Appeals.

CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC Railway Co., Appellant,
vs.
EDWARD COOK'S ADMINISTRATOR, Appellee. } Appeal from Mercer Circuit Court.

The court being sufficiently advised, it seems to them the judgment herein is erroneous.

47 It is therefore considered that said judgment be reversed, and cause remanded for a new trial, and for proceedings consistent with the opinion herein, which is ordered to be certified to said court.

It is further considered that appellant recover of appellee its costs herein expended.

And on said date the court delivered an opinion herein, which is in words and figures as follows:

Opinion of Court of Appeals.

Court of Appeals of Kentucky.

MARCH 22nd, 1902.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC Railway Company, &c., Appellants, *vs.* EDWARD COOK'S ADMINISTRATOR, Appellee.	Appeal from Mercer Circuit Court.

Opinion of the Court by Judge Hobson.

This action was filed on February 23, 1901, by appellee, to
48 recover for the death of his intestate against the Cincinnati, New Orleans and Texas Pacific Railway Co. and Fred Milligan, who was an engineer in its service. It was charged in the petition that the death of the intestate was due to the negligence of Milligan, as engineer in the service of the railroad company, in moving a train under his charge. At the May term of the circuit court the railroad company filed a petition for removal of the case to the circuit court of the United States, alleging that it is a resident of the State of Ohio, and that Milligan was improperly joined with it as a codefendant, for the fraudulent purpose of defeating the jurisdiction of the United States court. The court overruled the motion, and this is the first question to be determined on the appeal.

It is earnestly maintained that the joinder of the defendants is improper; that for the one act of the servant he can not be sued jointly with his master, and that his act must be treated either as that of an individual or that of an agent. In support of his position we are referred to several cases outside of this State so
49 holding. But the decided weight of authority is the other way. (15 Encyclopædia of Pleading and Practice, 560; 1 Thompson on Negligence, 611.)

The conflict in authority on the question seems to be due largely to differences of the common law forms of pleading, which no longer exist in this State. In Pomeroy on Remedies and Remedial Rights, section 307, it is said:

"In general those who have united in the commission of a tort to the person or to property, whether the injury be done by force or

be the result of negligence or want of skill, or of fraud and deceit, are liable to the injured party without any restriction or limit upon his choice of defendants against whom he may proceed. He may at his option sue all the wrong-doers in a single action, or may sue anyone, or may sue each in a separate action, or may sue any number he pleases less than all; the fullest liberty is given him in this respect. The only exceptions are those few instances in which the tort, from its very nature, must be a separate act, impossible to be committed by two or more jointly. A sheriff and his deputy may be sued jointly for the trespasses and other wrongful acts done by the latter in his official capacity; the deputy because he actually commits the tort, and the sheriff because he is the principal."

In a note to this a number of cases are collected, and among other illustrations these are given: "An action against principal and agent for negligence of the agent. * * * An action against one partner for negligence by the firm." (Bliss on Code Pleading, section 83.)

This rule was followed by this court in C. & O. Railway Co. *v.* Dixon's Adm'r, 104 Ky., 608, and in Illinois Central Railroad Co. *v.* Winston's Adm'r, and in the latter case the court, after quoting section 6, Kentucky statutes, giving the right of action in such cases, said:

"By the terms of this section, where death results from the negligent act, a recovery may be had therefor against the person or persons, company or companies, corporation or corporations, their agents or servants, causing the same. * * * The plaintiff has a right to proceed severally or jointly against those who are liable for the injury inflicted resulting in death."

We are, therefore, of opinion that the circuit court properly refused to remove the case to the Federal court.

It is also earnestly insisted that there was no testimony showing negligence on the part of the engineer, Milligan, and that a peremptory instruction should have been given. The evidence on behalf of the appellee tended to establish these facts: The engineer, fireman and two brakemen were engaged in transferring cars from the main line to the sidetrack in the yards of the company in Burgin, Ky., the intestate being one of the brakemen. The purpose was to leave a car on the sidetrack. To do this the engineer was required to back the cars in on the side track, there being a number of cars between the engine and the car intended to be left. The cars were provided with automatic couplers, which were operated by a bar extending out from the coupler to the side of the car, so that the brakemen could take hold of it while standing on the outside of the car, and uncouple the cars without danger. The intestate was on the fireman's side of the engine, and went down on this side to uncouple the car in question. The other brakeman was on the other side of the

train to turn the switch, so that when the car was uncoupled
52 it might be pushed in on the side track. The engineer could see this brakeman, but he could not see the intestate, Cook, who was on the other side of the train from him, and neither could his fellow brakeman. Cook communicated with the engineer by signals to the fireman, who reported them to the engineer. When Cook got to the car that was to be cut off he signaled for slack, which meant that the engineer must back the train a little. The engineer did this; Cook gave the stop signal, and the engineer stopped after the train had only moved from three to six feet. The iron bar of the automatic coupler was bent and would not work the coupler; so Cook went in between the cars after he got the slack to raise the pin with his hand, as it was his duty to do. While he was doing this, the other brakeman, who had turned the switch, and did not know of the difficulty Cook had met with in uncoupling the car, gave a signal to the engineer to come on, and the engineer, without a signal from Cook, or without knowing whether he was out or not, began backing the train down to the switch. In this way Cook was caught between the cars, and dragged some twenty feet, his breast bone and ribs were crushed and mashed, and he died in a few minutes.

53 The proper course of doing the work under the rules required the engineer not to move the train when he knew a brakeman was uncoupling without a signal from him, or notice of his safety. It is said that the engineer did not know that Cook was in between the cars, and that he got a signal from the brakeman to come ahead, and, therefore, the negligence, if any, was in this brakeman, or in the fireman, and not in the engineer. The engineer knew the purpose of the movement was to cut off the car. He knew that Cook went down on the opposite side of the train to uncouple it. When Cook asked for slack by his signal to the fireman, the engineer knew that he wanted this for the purpose of uncoupling the cars. He also knew that Cook would have to go in between the cars and draw the pin if the bar did not work, and the fact that Cook asked for slack was sufficient to put him on notice that there was some trouble; and it was a question for the jury whether, with this notice, he should have undertaken, under the rules and the proper course of such work, to move the train without a signal from Cook, or without information as to his whereabouts. The hazardous business of coupling and uncoupling cars must not be made more perilous to life
54 than ordinary regard for the safety of the men engaged in it permits. The engineer knew that Cook was making this uncoupling. He knew that a movement of the cars, without warning to Cook, might endanger his life, and it was a question for the jury whether ordinary care required that he should know where Cook was before obeying the signal from the other brakeman, who was on the opposite side of the train, and ignorant of what Cook was doing. The negligence was that of the engineer in moving the train. The

fireman was not negligent, nor was the other brakeman, for he did not know of the signals that Cook had given.

The witnesses for the company, including the engineer, all testify in substance that the injury did not occur in this way; but that Cook went in between the moving cars after he gave the slack signal, and then came out and gave the stop signal and fell down. This version of the transaction is inconsistent with circumstances that seem established beyond doubt, and we are of opinion that the jury were warranted in concluding that appellee's version was the true one. The court properly instructed the jury that they might allow compensatory damages if there was ordinary negli-
55 gence, and punitive damages if there was gross negligence. This is in accord with the provisions of the statute. (Kentucky Statutes, section 6.)

Where death does not result there can be a recovery by one in the service of the company for only the gross negligence of his superior, who was engaged with him in the same service. (Illinois Central Railroad Co. *v.* Coleman, 22 Ky. Law Rep., 878.) But where death results, and the action is under the statute, it controls, and there may be a recovery for ordinary negligence of the superior servants engaged in the same employment. (Linx's Adm'r *v.* L. & N. Railroad Co., 21 Ky. Law Rep., 1097.) The plaintiff having alleged the higher degree of negligence, might recover if he established negligence, without showing that it was gross; for this would be only a failure to prove a part of his allegation.

The court allowed the plaintiff to prove before the jury a statement by Milligan, made several hours after the injury, to the effect that Cook did not go in on his side, but on the fireman's side; that Sinkhorn, the other brakeman, was on the opposide side giving him signals; that the fireman said Cook was hurt, and he got
56 down and went to him. After he got down, Sinkhorn was still signalling him on down the track. He asked Cook how he was hurt; Cook said: "Milligan, you have caught me; I am dying." The court, in admitting the evidence, instructed the jury as follows: "Gentlemen of the jury, this testimony is not competent as to the C. N. O. & T. P. Ry. Co.; it is only competent as against Milligan." As Milligan was one of the defendants in the action, his statements were competent against him. But as they were made some hours after the occurrence, they were not part of the *res gestae*, and were, therefore, incompetent against the company. It is urged that this is a good reason for not allowing a joinder of the two defendants in one action; but the same thing occurs in all actions against joint defendants, either of tort or contract, and our statute provides for a joint action. The court gave the jury this instruction:

"If you believe from the evidence in this case that the deceased, Ed. Cook, was between the cars, and engaged in the act of uncoupling them; that the engineer in charge of the train knew, or had reasonable grounds to know, at the time that Cook was in that position and

thus engaged; that while Cook was in that position and thus
57 engaged said engineer received a signal to move the cars from an employé who was forbidden by the rules of the company to give such signal to the engineer under the circumstances then existing; that the engineer acted upon that signal and moved the cars while Cook was in that position engaged in uncoupling, thus injuring him so that he died, then in moving the train at that particular time was an act of negligence on the part of the engineer with reference to the personal safety to Cook, and you will find for the plaintiff compensatory damages against both defendants. The evidence for your consideration in fixing the amount of compensation embraces the testimony as to Cook's money-earning capacity at or about the time of his death, the state of his health and his expectancy of life. And if you believe from the evidence that the negligence of the engineer was gross, you may, in your discretion, find, in addition to compensation, punitive damages, by which is meant such damages as are imposed as a punishment for a wrong act purposely done, or done with great indifference to the safety of life. Gross negligence is a higher degree than ordinary negligence. It
58 is equivalent to the absence of slight care. If your verdict be for plaintiff, it shall be against both Milligan and defendant company, and can not exceed $30,000, the amount claimed in the petition. Unless you believe from the evidence that the propositions set forth in the first instruction are true, you will find for both defendants. By compensatory damages is meant such sum as will reasonably compensate the estate of deceased for the destruction of his power to earn money."

The instruction to the jury, that if their verdict was for the plaintiff, it should be against both Milligan and the company, would have been proper if there had been no evidence in the case that was competent against him, but incompetent against it. But the declaration of Milligan, which had been admitted, was incompetent against the company, and this evidence, under the other proof in the case, might have induced a verdict for the plaintiff, when, without it, the jury might have found for both defendants. The effect of the instruction was, therefore, to deny the company all benefit from the exclusion of this evidence as to it, and place it in the same
59 position it would have occupied if that ruling had not been made. If Milligan, as engineer, was negligent in backing the train, as set out in the first instruction, his negligence was the negligence of the company, and rendered it liable as well as him; but in determining whether he was so negligent as against the company, the jury should not consider any evidence which was admitted only against him and was incompetent against it.

On another trial the court will allow the defendants to read to the jury the rule under the heading, "Avoid other dangers," on page 58 of the book; also rules 652 and 654 in regard to obedience of signals by the engineer. The question is for the jury, whether under the rules and the usual course of doing the work, as shown by the

proof, the signals obeyed by the engineer were properly made, or should have been acted on by him without knowledge as to where Cook was or notice to him. There are a number of minor matters relied on for reversal; but on the whole record we are unable to see that there was any substantial error in any of these things.

Judgment reversed and cause remanded for a new trial.

60 And at a court of appeals held at the capital at Frankfort on the 22nd day of April, 1902, the following order was entered, to-wit:

C., N. O. & T. P. Ry. Co. v. Cook's Adm'r. } Mercer.

Came the appellant by counsel and filed a petition, and moved the court to extend the opinion herein, and the case is submitted on the motion and petition.

The petition mentioned in the foregoing order being in words and figures as follows, to-wit:

Motion for Extension of Opinion.

Kentucky Court of Appeals.

Cincinnati, New Orleans & Texas Pacific Railway Company, Appellant, vs. Edward Cook's Adm'r, Appellee. } Motion for Extension of Opinion.

The appellant comes and asks the court to extend its opinion herein for the following reasons:

1st. In considering the testimony, the court has been led
61 into error as to the facts in the case as to the knowledge of the engineer as to Cook's position at the time of the accident.

Upon this, the court says, that the fact that the engineer received the signal to slack was evidence that Cook would have to go between the cars to uncouple them and was sufficient to put him upon his notice that there was some trouble. In this assumption the court is wholly in error, the evidence showing that the train was on an upgrade, and that to uncouple at all it was necessary to give the slack.

2nd. The court has overlooked the fact that even if the coupling bar was bent that there was a safe method by which the car could have been uncoupled without incurring any danger and that Cook utterly failed to use this method.

3rd. The court assumes that Cook was hurt while the train was being backed on the signal by Sinkhorn. Of this there is not one

syllable of proof. The witness Curd, who testified that he saw Sinkhorn giving the signal states that at the time Cook was lying upon the side track, injured, and this is the only proof upon this subject.

62 For these reasons, we respectfully ask the court to extend its opinion so as to cover the law applicable to these facts.

E. H. GAITHER,
Att'y for Appellant.

And at a court of appeals held at the capitol at Frankfort on the 25th day of April, 1902, the following order was entered, to-wit:

C., N. O. & T. P. R'y Co. v. Cook's Adm'r. } Mercer.

The court being sufficiently advised, the petition herein for extension of opinion is overruled.

a No. 2.

Transcript.

The Cincinnati, New Orleans and Texas Pacific Railway Company, Appellant, vs. Edward Cook's Administrator, Appellee. } Appeal from Mercer Circuit Court.

1-32½ Pleas Before the Honorable the Court of Appeals of Kentucky, at the Capitol, in the City of Frankfort, on the 16th Day of April, 1903.

Cincinnatti, New Orleans & Texas Pacific Railway Company, Appellant, vs. Edward Cook's Administrator, Appellee. } Appeal from Mercer Circuit Court.

Be it remembered that heretofore, to-wit: on the 15th day of December, 1902, the appellant by its attorneys filed in the clerk's office of the court of appeals, a transcript of the record, in words and figures as follows, to-wit:

Pleas Before Hon. M. C. Saufley, Judge of the Mercer Circuit Court, at the Court House in Harrodsburg, Kentucky, on Wednesday, May the 28th, 1902.

33 And then at another term of said court, to-wit: May term. May 12th, 1902, the following order was entered herein:

Mercer Circuit Court, May Term, First Day, May 12th, 1902.

EDWARD COOK'S ADM'R, Pl'ff,
v.
C., N. O. & T. P. RY. CO., &C., Def't.

Mandate of court of appeals filed in office by plaintiff May 2nd, 1902.

Which mandate is as follows:

Mandate of Court of Appeals.

THE COMMONWEALTH OF KENTUCKY:

The Court of Appeals, March 22nd, 1902.

CINCINNATI, NEW ORLEANS AND TEXAS Pacific Railway Company, &c., Appellant,
against
EDWARD COOK'S ADM'R, Appellee.
} Appeal from a Judgment of the Mercer Circuit Court.

The court being sufficiently advised, it seems to them the judgment herein is erroneous.

34–37 It is therefore considered that said judgment be reversed and cause remanded for a new trial and for proceedings consistent with the opinion herein.

Which is ordered to be certified to said court.

A copy—

Att.: S. J. SHACKELFORD, C. C. A.,
By ROB'T L. GREENE, D. C.

Issued, May 2nd, 1902.

Endorsed: 1902, May 2nd, filed. Ben C. Allin, clerk.

* * * * * * *

38 And then on another day of said term, to-wit: May 28th, 1902, the following order was entered herein:

"Judgment" & Verdict.

EDWARD COOK'S ADM'R, Plaintiff,
vs.
CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILway Co., &c.
} Judgment.

This day again came the parties by attorneys, as also the jury sworn herein on yesterday appeared and took their seats,

39 & 40 and the argument of counsel being heard, said jury retired to consult of their verdict, and returned into court the follow-

ing verdict, viz: "We the jury find for the plaintiff against both defendants in the sum of seven thousand dollars, Leon Sommers, foreman." Wherefore, it is adjudged that plaintiff, George Bohon, administrator of Edward Cook, deceased, recover of the defendants, Cincinnati, New Orleans & Texas Pacific Railway Company and Fred Milligan, the sum of seven thousand dollars, the amount so found by the verdict aforesaid, with interest from this date until paid, and his costs herein expended.

And then on another day of said term, to-wit: May 29th, 1902, the following order was entered herein:

EDWARD COOK'S ADM'R, Plaintiff,
vs.
CINNCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY Co., &c., Defendant.

The defendants file herein motion and grounds for new trial, and submitted on same.

* * * * * * *

41 And then on another day of said term, to-wit: June 5th, 1902, the following order was entered herein:

Judgment on Motion & Grounds for New Trial.

EDWARD COOK'S ADM'R, Plaintiff,
vs.
CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, &c., Defendants.

The court on consideration overrules the motion and grounds of defendants for a new trial, to which the defendants excepts,
42 and prays an appeal to the court of appeals, which is granted, and time is given defendants until the 3rd day of next term to tender bill of exceptions herein.

And then at another term of said court, to-wit: October term, October 6th, 1902, the following order was entered herein:

EDWARD COOK'S ADM'R, Plaintiff,
vs.
CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, Defendants.

This day came the parties by attorneys and the defendant Cincinnati, New Orleans and Texas Pacific Railway Company tendered herein its bill of exceptions, and a copy.

And then on another day of said term, to-wit: October 17th, 1902, the following order was entered herein:

EDWARD COOK'S ADM'R, Plaintiff,
vs.
CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, &c., Defendants.

The defendant Cincinnati, New Orleans & Texas Pacific
43–54 Railway Company having on a former day of this term tendered its bill of exceptions herein and the same being examined and signed by the court it is ordered that the same be filed and made a part of the record which is done.

* * * * * * *

55 And afterwards on the 16th day of April, 1903, at a court of appeals at the capitol at Frankfort, the following judgment was entered, to-wit:

Judg't.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC Railway Company, Appellant,
vs.
EDWARD COOK'S ADMINISTRATOR, Appellee.
} Appeal from Mercer Circuit Court.

The court being sufficiently advised, it seems to them the judgment herein is erroneous.

It is therefore considered that said judgment be reversed, and cause remanded with directions to grant appellant a new trial, and for further proceedings consistent with the opinion herein, which is ordered certified to said court.

56 It is further considered that the appellant recover of the appellee its cost herein expended.

And on said day the following opinion in said case was delivered to-wit:

Opinion of Court of Appeals.

Court of Appeals of Kentucky.

APRIL 16TH, 1903.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC Railway Company, &c., Appellants,
vs.
EDWARD COOK'S ADMINISTRATOR, Appellee.
} Appeal from Mercer Circuit Court.

Opinion of the Court by Judge Hobson.

On the former appeal the facts of this case were stated as follows: "The engineer, fireman and two brakemen were engaged in

transferring cars from the main line to the side track in the
57 yards of the company in Burgin, Ky., the intestate being one of the brakemen. The purpose was to leave a car on the side track. To do this, the engineer was required to back the cars in on the side track, there being a number of cars between the engine and the car intended to be left. The cars were provided with automatic couplers, which were operated by a bar extending out from the coupler to the side of the car, so that the brakeman could take hold of it while standing on the outside of the car and couple the cars without danger. The intestate was on the fireman's side of the engine, and went down on this side to uncouple the car in question. The other brakeman was on the other side of the train to turn the switch so that when the car was uncoupled it might be pushed on the side track. The engineer could see this brakeman, but he could not see the intestate, Cook, who was on the other side of the train from him, and neither could his fellow brakeman. Cook communicated to the engineer by signals to the fireman, who reported them to the engineer. When Cook got to the car that was to be cut off
58 he signaled for slack, which meant that the engineer must back the train a little. The engineer did this; Cook gave the stop signal, and the engineer stopped after the train had only moved from three to six feet. The iron bar of the automatic coupler was bent and would not work the coupler; so Cook went in between the cars after he got the slack to raise the pin with his hand, as it was his duty to do. While he was doing this, the other brakeman, who had turned the switch, and did not know of the difficulty Cook had met with in uncoupling the car, gave a signal to the engineer to come on, and the engineer, without a signal from Cook, or without knowing whether he was out or not, began backing the train down to the switch. In this way Cook was caught between the cars, and dragged some twenty feet; his breast bone and ribs were crushed and smashed, and he died in a few minutes."

On these facts it was held that the case was properly submitted to the jury, and that if the engineer in charge of the train knew, or had reasonable grounds to know, that Cook was between the cars, engaged in making the uncoupling, and with this knowledge,
59 received a signal to move the cars from the other brakeman, and negligently obeyed this signal, not exercising proper care for Cook's safety while he was in between the cars uncoupling, and thus injured him, the defendants were liable. (L. & N. R. R. Co. *v.* Adams' Adm'r, 21 Ky. Law Rep., 428; L. & N. R. R. Co. *v.* Earle's Adm'r, 94 Ky., 368.)

But the judgment was reversed for an error in one of the instructions. On the return of the case to the circuit court it was tried anew, and a verdict having been again rendered in favor of the plaintiff, the defendants have appealed. The only question we deem it necessary to consider is whether the evidence introduced on the last trial was sufficient to submit the case to the jury or to sustain the verdict. On the former appeal the defendants introduced their tes-

timony, and thus all the facts of the case were brought out; but on the second trial the defendants introduced no testimony, and the case was submitted to the jury on the testimony introduced by the plaintiff alone, the defendants standing on their motion for a peremptory instruction. The rule is that where the defendant moves for a peremptory instruction at the conclusion of the plaintiff's evidence, and his motion being overruled, introduces his testi-
60 mony, if that testimony supplies any fact or facts not shown by the evidence for the plaintiff, and thus makes out a case, this court will not reverse because these facts were not shown by the plaintiff before the motion for a peremptory instruction was made. To avoid this rule the defendants on the last trial of the case did not introduce any evidence, this court on the former appeal having considered the case under all the evidence before it.

The evidence for the plaintiff on the second trial falls far short of showing the facts set out in the former opinion. But one witness who saw the occurrence was introduced, and he knew nothing more about it than that the train was backing in obedience to the signal of Sinkhorn, and about this time he saw Cook lying on the side of the track, wounded. The other testimony for the plaintiff added nothing to the testimony of this witness as to the facts of the occurrence, except to show that Cook was dragged along the track, as shown by the signs on the ballast, and was crushed between two cars, as shown by the signs on the cars. It was not shown that Cook went between the cars for the purpose of uncoupling them, or in fact why he
61–87 went between the cars, or for what purpose, or that the engineer knew he was between the cars, or ought to have known it, or that there was any failure on his part to exercise proper care for Cook's safety. It was not shown that Cook gave the engineer any signal, and to sustain a verdict under such evidence would be in substance to hold that Cook's injury made out a *prima facie* case against the defendants. The law does not presume negligence, and to recover the plaintiff must show facts establishing negligence on the part of the defendant.

As the case may be tried again, we deem it proper to say that the court should instruct the jury that if Cook failed to use ordinary care, and but for this would not have been hurt, they should find for the defendants. The court should also instruct the jury that the admissions of Milligan were only competent against him, and that no fact so admitted by Milligan should be considered against the railroad company, unless shown by other evidence in the case.

Judgment reversed and cause remanded for a new trial, and for further proceedings consistent herewith.

* * * * * * *

88 And afterwards on the 17th day of June, 1903, at a court of appeals held at the capitol at Frankfort, the following order was entered, to-wit :

C., N. O. & T. P. Ry. Co. v. Cook's Adm'r. } Mercer.

The court being sufficiently advised, delivered a response, and petition for rehearing is overruled.

And on said day the following response to petition for rehearing in said case was delivered, to-wit:

Response to Petition for Rehearing.

Court of Appeals of Kentucky.

JUNE 17TH, 1903.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC Railway Company, &c., Appellants, vs. EDWARD COOK'S ADMINISTRATOR, Appellee. } Appeal from Mercer Circuit Court.

Response to Petition for Rehearing by Judge Barker.

We have re-examined the pleadings and evidence in this
89 case, in response to the requirements of the petition for a rehearing, and are convinced that the statement of the evidence contained in the opinion is correct. Appellee is in error as to the facts admitted by the pleadings. On the subject as to where the intestate, Edward Cook, was, and what he was doing at the time of his death, the petition contains the following allegation:

"Plaintiff avers that on the — day of ——, 1901, his intestate, Edward Cook, as brakeman and switchman for the defendant company, was engaged in said yard in uncoupling and giving attention to the defendant's cars for said defendant, * * * and the defendant, Fred Milligan, caught and crushed said Cook's body between the cars of said train, by and through the gross negligence and carelessness of said Milligan, as engineer of said defendant company, in the management, movement and operation of its said engine and train, * * * so injuring him that he died within a few minutes thereafter; and when so caught and crushed said Cook was engaged in discharging his duties as said brakeman to said company."

The third paragraph of the defendant company's answer contains the following denial:

90 "It denies that it, or the defendant, Fred Milligan, caught or crushed said Cook's body in the cars of said train, * * * or that it thereby so injured him that he died in a few minutes thereafter, or when so caught or crushed said Cook was

engaged in the discharge of his duties as said brakeman for said company."

This denial in the answer, so far as the question as to what Cook was doing at the time he was killed, is as broad as the allegation of the petition, and placed in issue the fact as to whether or not Cook was between the cars engaged in the company's business at the time he was killed. The testimony of the witnesses does not show that Cook was between the cars in the discharge of his duties as brakeman when he was crushed, or that the engineer, Milligan, knew he was between the cars at all.

The petition is overruled.

a

No. 3.

Transcript.

THE CINCINNATI, NEW ORLEANS AND TEXAS Pacific Railway Compant, Appellant, *vs.* EDWARD COOK'S ADMINISTRATOR, Appellee. } Appeal from Mercer Circuit Court.

1 Pleas Before the Honorable the Court of Appeals of Kentucky, at the Capitol at Frankfort, on the 7th day of December, 1904.

THE CINCINNATI, NEW ORLEANS AND TEXAS Pacific Railway Company, Appellant, *vs.* EDWARD COOK'S ADMINISTRATOR, Appellee. } Appeal from Mercer Circuit Court.

Be it remembered that heretofore, to wit: on the nineteenth day of July, 1904, the appellant by its attorneys filed in the clerk's office of the court of appeals a transcript of record, in words and figures as follows, to-wit:

Pleas Before the Hon. W. C. Bell, Judge of the Mercer Circuit Court, at the Court-house in Harrodsburg, Kentucky, on Monday, February 8th, 1904.

2 Be it remembered that heretofore, October 14th, 1903, the defendant by attorney filed in the office of the clerk of the Mercer circuit court, the following mandate of the court of appeals of Kentucky, which mandate is in words and figures as follows:

October Term, October 14th, 1903.

EDWARD COOK'S ADMINISTRATOR, Pl'ff, *vs.* C., N. O. & T. P. RY. CO., Def'ts.

This day came the parties and the defendant filed herein the mandate of the court of appeals, which is as follows:

Mandate.

THE COMMONWEALTH OF KENTUCKY:

The Court of Appeals, April 16th, 1903.

CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC Railway Company, Appellant,
vs.
EDWARD COOK'S ADM'R, Appellee.
} Appeal from a Judgment of the Mercer Circuit Court.

The court being sufficiently advised, it seems to them the judgment herein is erroneous.

3–7 It is therefore considered that said judgment be reversed and cause remanded with directions to grant appellant a new trial, and for further proceedings consistent with the opinion herein. Which is ordered to be certified to said court.

A copy—
Attest: S. J. SHACKELFORD, C. C. A.
By ROB'T L. GREENE, D. C.

Re-issued, October 7th, 1903.

Endorsed: 1903, October 7th, filed. Ben C. Allin, clerk.

And plaintiff moved the court to have this case placed upon the docket and set for trial at this term, to which the defendant objects.

* * * * * * *

8 And then on another day of said term, to-wit: February 8th, 1904, the following order was entered herein:

Verdict and Judgm't.

9–10 EDWARD COOK'S AD'M., Pl'ff,
v.
C., N. O. & T. P. RY. CO., &c., Def'ts.

This day again came the parties, also the jury sworn herein appeared, and retired to consult of their verdict and returned into court the following verdict, to-wit: "We, the jury, find for the plaintiff against the defendants and place the sum of damages at $5,000.00, M. H. Cecil, foreman of the jury." Wherefore it is adjudged that the plaintiff, George Bohon, administrator of Edward Cook, deceased, recover of the defendants Cincinnati, New Orleans and Texas Pacific Railway Company and Fred Milligan the sum of five thousand dollars the amount so found by the verdict of the jury aforesaid with interest from this date until paid and his cost herein expended.

And then on another day of said term, to-wit: February 9th, 1904, the following order was entered herein:

EDWARD COOK'S ADM'R, Pl'ff,
v.
C., N. O. & T. P. RY. CO., &C., Def'ts.

The defendants filed herein motion and grounds for a new trial, and submitted on same.

* * * * * * *

11 And then on another day of said term, to-wit: February 18th, 1904, the following order was entered herein:

Judgm't on Motion & Grounds for New Trial.

EDWARD COOK'S ADM'R, Pl'ff,
v.
C., N. O. & T. P. RY. CO., &C., Def'ts.

The court upon consideration overrules the motion and grounds of defendants for a new trial herein, to which defendants except and pray an appeal to the court of appeals, which is granted, and time given them until the 3rd day of the next term of court to tender bill of exceptions herein.

12-27

And then on another day of said term, to-wit: February 19th, 1904, the following order was entered herein:

EDWARD COOK'S ADM'R, Pl'ff,
v.
C., N. O. & T. P. RY. CO., &C., Def'ts.

This day came parties by attorneys and the defendant tendered a bill of exceptions and copy herein, which being examined and signed by the court, were signed and ordered to be filed and made a part of the record, which is done.

* * * * * * *

28 And afterwards on the 7th day of December, 1904, at a court of appeals at the capitol at Frankfort, the following judgment was entered, to-wit:

Judgm't of Court of Appeals.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, Appellant,
vs.
EDWARD COOK'S ADM'R, Appellee.
} Appeal from the Mercer Circuit Court.

The court being sufficiently advised, it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed, and that the appellee recover of appellant ten per cent. damages on amount of the judgment superseded herein, which is ordered certified to said court.

29 It is further considered that the appellee recover of the appellant its costs herein expended.

And on said day the following opinion in said case was delivered, to-wit:

Opinion of Court of Appeals.

Court of Appeals of Kentucky.

DECEMBER 7TH, 1904.

CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC Railway Company, Appellant, vs. EDWARD COOK'S ADMINISTRATOR, Appellee. } Appeal from Mercer Circuit Court.

Opinion of the Court by Judge Nunn.

This is the third time this case has been before this court. The appellee obtained a verdict upon the first trial for $8,000.00, upon the second for $7,000.00, and upon the third for $5,000.00, and from this last judgment the railroad company appeals, and asks a
30 reversal because the evidence is insufficient to support the verdict. The opinion of the court reversing the verdict upon the first trial will be found — page 2410, volume 23, Ky. Law. Rep. The opinion reversing the second judgment will be found in 24 Ky. Law Rep., 2152. The first reversal was solely upon an error in the instructions given by the court to the jury. The second reversal was because of insufficient evidence to sustain the judgment.

The court in its first opinion reviewed the evidence of the appellant and appellee and determined the duty owing by the engineer in charge of the train to appellee's intestate. That opinion is referred to for the particulars as to such duty and the facts proven. On the second trial the appellant did not introduce any evidence, and this court on the appeal from that judgment determined that appellee's evidence was insufficient to support the verdict. In that opinion the court said:

"The evidence for the plaintiff on the second trial falls far short of showing the facts set out in the former opinion. But one witness who saw the occurrence was introduced, and he knew nothing more about it than that the train was backing in obedience to the
31 signal of Sinkhorn, and about this time he saw Cook lying on the side of the track, wounded. The other testimony for the plaintiff added nothing to the testimony of this witness as to the facts of the occurrence, except to show that Cook was dragged along the track, as shown by the signs on the ballast, and was crushed between two cars, as shown by the signs on the cars. It was not shown that Cook went between the cars for the purpose of uncoupling them, or, in fact, why he went between the cars, or for what purpose, or

that the engineer knew he was between the cars, or ought to have known it, or that there was any failure on his part to exercise proper care for Cook's safety. It was not shown that Cook gave the engineer any signal, and to sustain a verdict under such evidence would be in substance to hold that Cook's injury made out a *prima facie* case against the defendants."

On the third trial of the case in the lower court the appellee introduced additional witnesses, one of whom was Watson, the fireman, by whom it was proven that Cook went between the cars for the purpose of uncoupling them; that he received a "back
32–45 up a little" signal from Cook, which he conveyed to Milligan, the engineer; that Milligan knew through him, the witness, that Cook was cutting off, or endeavoring to cut off, the red car. It was proven by several witnesses that the reason Cook went between the cars was for the purpose of uncoupling them by raising the pin with his hands, and that it was necessary for him to do this for the reason that the rod prepared and used for that purpose had become bent, and would not work or raise the pin.

Appellant asks a reversal for other reasons, but the questions raised were settled by the former opinions.

Wherefore, the judgment of the lower court is affirmed.

* * * * * * *

46 And afterwards on the 12th day of January, 1905, at a court of appeals held at the capitol at Frankfort, the following order was entered, to wit:

C., N. O. & T. P. Ry. Co.
v.
Cook's Adm'r. } Mercer.

The court being sufficiently advised, it is considered that appellant's petition for rehearing be, and the same is, overruled.

Be it remembered that afterwards on the 17th day of January, 1905, there was filed in the office of the clerk of this court a notice, which is in words and figures as follows, to wit:

47

Notice.

Court of Appeals of Kentucky.

The Cincinnati, New Orleans & Texas Pacific Railway Company and Fred Milligan, Appellants,
vs.
George Bohon, Administrator of Edward Cook, Deceased, Appellee. } Notice.

To Fred Milligan:

You are hereby notified that the undersigned, The Cincinnati, New Orleans & Texas Pacific Railway Company, sued herein with

you, will, on the 17th day of January, 1905, at Frankfort, Kentucky, apply to Honorable J. P. Hobson, chief justice of the court of appeals of Kentucky, for a writ of error, with supersedeas, to the Supreme Court of the United States, and in case you shall not then and there appear and join in said application, the undersigned will ask for a writ of error in its own name.

Signed this — day of January, 1905.

THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY,
By JOHN GALVIN,
MAURICE L. GALVIN,
E. H. GAITHER, Attorneys.

48 The undersigned accepts service of the above notice, and hereby declines to join in any application for a writ of error in the above case.

Signed this 16th day of January, 1905.

FRED B. MILLIGAN.

And afterwards there was filed in the office of the clerk of this court a petition for a writ of error from the United States Supreme Court to the court of appeals of the Commonwealth of Ky., and which original petition is hereto attached, and is as follows:

49 Court of Appeals of Kentucky.

THE CINCINNATI, NEW ORLEANS & TEXAS Pacific Railway Company and Fred Milligan, Appellants, *vs.* GEORGE BOHON, Aministrator of Edward Cook, Deceased, Appellee.	Petition for Writ of Error.

To the Honorable J. P. Hobson, chief justice of the court of appeals of the State of Kentucky:

Your petitioner, The Cincinnati, New Orleans & Texas Pacific Railway Company, respectfully shows that it- co-appellant herein, Fred Milligan, has declined to join in this petition, or to prosecute the writ of error herein, and notice of severance has been duly filed herein, and your petitioner further shows that a final judgment has been entered in this court in this cause against your petitioner, and in favor of George Bohon, administrator of Edward Cook, deceased, and that said judgment of this court is a final judgment in the highest court of the State of Kentucky in which a decision in said suit could or can be had.

Your petitioner further shows that a Federal question was made in said cause, to wit: the right of this petitioner, The Cincinnati,

New Orleans & Texas Pacific Railway Company, who was, at the time of the institution of this suit in the Mercer circuit court, of Kentucky, and ever since has been, and is now, a corporation under the laws of the State of Ohio, and a resident and citizen of the
50 said State of Ohio, to remove said cause from said Mercer circuit court, Kentucky, to the United States circuit court for the eastern district of Kentucky, being the proper district, on the ground of the diverse citizenship between the said, The Cincinnati, New Orleans & Texas Pacific Railway Company, your petitioner, who was and is a resident and citizen of the State of Ohio, and the said George Bohon, administrator of Edward Cook, deceased, who was at the time of the institution of said suit, and at the time of the filing of the petition for removal by your petitioner, in said Mercer circuit court, as shown by the record herein, and ever since has been, a citizen and resident of the State of Kentucky, there being a separable controversy between your said petitioner and the said George Bohon, administrator of Edward Cook, deceased, and the judgment of the court of appeals of Kentucky was repugnant to and in conflict with the laws of the United States, and the removal acts of its Congress, and that said judgment of said court of appeals of Kentucky was contrary thereto, and that the decision of said Federal question was necessary to the judgment rendered.

Wherefore, your petitioner prays for the allowance of a writ of error from the Supreme Court of the United States to the court of appeals of the State of Kentucky, and the judges thereof, to the end that the record in said matter may be removed into the Supreme Court of the United States, and the error complained of by your petitioner may be examined and corrected, and the said judgment reversed; that citation be granted and signed; that the bond herewith presented be approved, and said writ of error and bond may operate as a supersedeas of said judgment.

THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY,
By JOHN GALVIN,
MAURICE L. GALVIN,
E. H. GAITHER,
Attorneys for Petitioner.

50½ [Endorsed:] Filed Jan. 17, 1905. J. Morgan Chinn, C. C. A.

51 And afterwards on the 17th day of January, 1905, there was filed in the office of the clerk of this court, an assignment of errors, which original assignment of errors is hereto attached, and is as follows:

52 Supreme Court of the United States.

THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC Railway Company, Plaintiff in Error,
vs.
GEORGE BOHON, Administrator of Edward Cook, Deceased, and Fred. Milligan, Defendants in Error.

Assignment of Error.

The Cincinnati, New Orleans & Texas Pacific Railway Company, plaintiff in error in the above entitled cause, complains of the judgment rendered herein by the court of appeals of Kentucky, and for error therein, assigns the following:

1. The court erred in affirming the judgment of the Mercer circuit court, of Kentucky; whereas it should have reversed the same, with directions not to proceed in the said cause.

2. The court erred in holding in substance and effect, that The Cincinnati, New Orleans & Texas Pacific Railway Company had no right, under the Constitution and laws of the United States to remove this cause pending in the Mercer circuit court, against it, to the circuit court of the United States, for the eastern district of Kentucky, and that the said, The Cincinnati, New Orleans & Texas Pacific Railway Company, had no right, under the Constitution and laws of the United States, to have the said cause removed as aforesaid.

3. The court erred in holding that the Mercer circuit court had any right to proceed any further in the said cause after the petition to remove the same on behalf of The Cincinnati, New Orleans & Texas Pacific Railway Company had been filed in the said Mercer circuit court.

53 4. The court erred in holding that the proceedings in the Mercer circuit court after the filing of the petition of The Cincinnati, New Orleans & Texas Pacific Railway Company therein, for the removal of the said cause to the circuit court of the United States, for the eastern district of Kentucky, were not void, and of no force and effect, as against the said, The Cincinnati, New Orleans & Texas Pacific Railway Company.

Wherefore, the said, The Cincinnati, New Orleans & Texas Pacific Railway Company, prays that the said judgment of the court of appeals of Kentucky be reversed, with directions to make such order in the premises as will result in the nullification of the judgment against it, and removal of the said cause from the Mercer circuit court to the United States circuit court for the eastern district of Kentucky.

JOHN GALVIN,
MAURICE L. GALVIN,
E. H. GAITHER,
Attorneys for The Cincinnati, New Orleans & Texas Pacific Railway Company.

53½ [Endorsed:] Supreme Court of the U. S. The C., N. O. & T. P. Ry. Co. *vs.* Geo. Bohon, adm'r of Edward Cook, etc. Assignment of errors. Filed Jan. 17, 1905. J. Morgan Chinn, C. C. A.

54 And afterwards there was filed in the office of the clerk of this court order allowing the writ of error and approving the bond, which order is as follows:

Order.

Kentucky Court of Appeals.

THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILway Company, Appellant,
vs.
GEORGE BOHON, Administrator of Edward Cook, Appellee. } Order.

The above case coming on to be heard upon the application of the Cincinnati, New Orleans & Texas Pacific Railway Company for a writ of error from the Supreme Court of the United States to the court of appeals of Kentucky, and upon the record, and the court desiring to give said appellant an opportunity to present in said Supreme Court of the United States the question presented by the record in said cause, it is now ordered that a writ of error be, and it is hereby, allowed to this court from the Supreme Court of the
55 United States, and that the bond presented by the said Cincinnati, New Orleans & Texas Pacific Railway Company, be and the same is hereby, approved.

J. P. HOBSON,
Chief Justice of the Court of Appeals of Kentucky.

And afterwards on the 17th day of January, 1905, there was filed in the office of the clerk of this court a writ of error, which original writ of error is hereto attached, and is as follows:

56 UNITED STATES OF AMERICA:

The President of the United States to the honorable judges of the court of appeals of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment, of a plea which is in the said court of appeals before you or some of you, being the highest court of law and equity of the said State, in which a decision could be had in the said suit between The Cincinnati, New Orleans & Texas Pacific Railway Company and Fred Milligan, appellants, and George Bohon, administrator of Edward Cook, deceased, appellee, wherein was drawn in question a right and authority existing under the laws of the United

States, and the decision was against the exercise of such right and authority, and wherein was drawn in question the construction of a statute of the United States, and the decision was against the right, title or privilege specifically set up and claimed under said statute of the United States, a manifest error hath happened, to the great damage of the said, The Cincinnati, New Orleans & Texas Pacific Railway Company, as by its complaint appears; and

Whereas, it has given written notice to its co-appellant in said cause, of its intention to apply for a writ of error from the Supreme Court of the United States to the said court of appeals of Kentucky in said cause, specifying in said notice the time and place of such intended application, as appears from such notice, duly executed on all of said parties, and which is attached hereto, and said co-appellant having, however, failed to appear at the date of the
57 making of such application, which was at the time and place mentioned in said notice, and being therefore made defendant in error herein, we being willing that error, if any hath been done, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days from the date hereof, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error that of right and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 17th day of January, in the year of our Lord one thousand, nine hundred and five, and of the Independence of the United States of America the one hundred and twenty-ninth.

[Seal 6th Circuit Court, Ky. Dist., U. S. of America.]

JOS. C. FINNELL,
Clerk United States Circuit Court,
Eastern District of Kentucky.
By J. W. MENZIES, D. C.

Allowed 17th day of January, 1905.

J. P. HOBSON,
Chief Justice, Court of Appeals of Kentucky.

57½ [Endorsed:] Kentucky court of appeals. The Cincinnati New Orleans & Texas Pacific Ry. Co. *vs.* Geo. Bohon, adm'r of Edward Cook, dec'd. Writ of error. Filed Jan. 17, 1905. J. Morgan Chinn, C. C. A.

58 And afterwards on the 17th day of January, 1905, there was filed in the office of the clerk of this court a supersedeas bond, and which bond is in words and figures as follows:

Bond.

Court of Appeals of Kentucky.

THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILway Company and Fred Milligan, Appellants,
vs.
GEORGE BOHON, Administrator of Edward Cook, Deceased, Appellee.
} Bond.

Know all men by these presents: that the Cincinnati, New Orleans & Texas Pacific Railway Company as principal, and —— —— as sureties, are held and firmly bound unto George Bohon, administrator of Edward Cook, deceased, and to Fred Milligan, in the sum of ten thousand dollars to be paid to the said obligees herein, to which payment well and truly to be made, we bind ourselves and each of us jointly and severally, and our and each of our successors,
59 heirs, executors and administrators, firmly by these presents.
Sealed with our seals and upon this 17th day of January,
1905.

Whereas, the above named, The Cincinnati, New Orleans & Texas Pacific Railway Company, hath prosecuted a writ of error from the Supreme Court of the United States to reverse a judgment in the above entitled cause by the court of appeals of Kentucky, the said writ of error is to operate as a supersedeas;

Now, therefore, the condition of this obligation is such that if the above named, The Cincinnati, New Orleans & Texas Pacific Railway Company, shall prosecute its said writ of error to effect, and answer to the judgment herein rendered, damages and all costs, if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY,
By JOHN GALVIN, Its General Attorney.
THE UNITED STATES FIDELITY & GUARANTY CO,
By JAMES H. POLSGROVE, Att'y in Fact.

Approved 17th day of January, 1905.
J. P. HOBSON,
Chief Justice Court of Appeals of Kentucky.

60 With said bond was a power of attorney from the United States Fidelity and Guaranty Company to James H. Polsgrove, which power of attorney is in words and figures as follows:

Power of Attorney.

Know all men by these presents, that the United States Fidelity and Guaranty Company, a body corporate, duly incorporated under the laws of the State of Maryland, doth hereby constitute and appoint James H. Polsgrove, of the city of Frankfort, county of Franklin, and State of Kentucky, to be its true and lawful attorneys in and for the county of Franklin all in the State of Kentucky, for the following purposes, to-wit: To sign its name as surety to, and to execute, acknowledge, justify upon and deliver any and all stipulations, bonds and undertakings given or required in any judicial action or proceedings brought or pending within the aforesaid county of the said State or in any judicial action or proceeding over which a United States court shall exercise jurisdiction. It being the intention of this power of attorney to fully authorize and empower the said James H. Polsgrove to sign the name of said company
61 and affix its corporate seal as surety to any or all of said stipulations, bonds and undertakings and thereby to lawfully bind it as fully and to all intents and purposes as if done by the duly authorized officers of said company with the seal of said company thereto affixed, and the said company hereby ratifies and confirms all and whatsoever the said James H. Polsgrove may lawfully do in the premises by virtue of these presents.

In witness whereof the said The United States Fidelity and Guaranty Company pursuant to a resolution of its board of directors duly passed on the 11th day of July, A. D. 1898 (a certified — of which is hereto annexed), has caused these presents to be sealed with its common and corporate seal duly attested by its 2nd vice-president and by its ass't secretary this 3rd day of December, A. D. 1903.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY,

[SEAL.] By EDW. J. PENNIMAN, 2nd Vice-President.
RICH'D D. LONG, Ass't Secretary.

STATE OF MARYLAND, City of Baltimore, } ss:

I, Harry C. Mathien, a commissioner of deeds for the State
62 of Kentucky, duly appointed and qualified in and for the city of and State aforesaid, hereby certify that on this 3rd day of December, A. D. 1903, personally appeared before me Edw. J. Penniman, 2nd vice president, and Rich'd D. Long, ass't secretary, of the United States Fidelity and Guaranty Company, to me personally known to be the said officers of the said corporation and individuals who executed the foregoing instrument, and they each duly acknowledged the execution of the same as the act and deed of the said corporation, and being by me duly sworn severally and each,

for himself did depose and say that they are the said officers of the said corporation, and the seal affixed to the foregoing instrument is the corporate seal of the said corporation, and that the said corporate seal and their signatures as such officers were duly affixed and subscribed to the said instrument by the authority and direction of the said corporation.

In testimony whereof I have hereunto set my hand, affixed my official seal at the city of Baltimore the day and year above written.

HARRY C. MATHIEN,
A Commissioner of Deeds for the State of Kentucky,
[SEAL.] Residing in the City of Baltimore,
State of Maryland.

63 Copy of Resolution.

That whereas it is often necessary in order to facilitate the business of the company in States other than Maryland, and in the Territories, to have stipulations, bonds and undertakings given or required in judicial actions or proceedings executed with the least delay and with promptness:

Now, therefore, be it resolved that the president or one of the vice presidents and the secretary or assistant secretary be and they are hereby authorized to appoint one or more persons residing in the States other than Maryland and in the Territories of the United States to sign the name of the company as surety to and to execute, acknowledge, justify upon and deliver any and all stipulations, bonds and undertakings given or required in any judicial action or proceeding within any one of the said States or Territories, and that the said person or persons so appointed are hereby authorized and empowered to sign the name of the company and to affix its corporate seal as surety to said stipulations, bonds and undertakings, and to sign their names thereto in attestation of same and thereby to lawfully bind the company to all intents and purposes as if done
64 by its duly authorized officers and the company through us, its board of directors, hereby ratifies and confirms all and whatsoever the said person or persons may lawfully do by virtue of the authority hereby vested in them.

I, Rich'd D. Long, ass't secretary of the United States Fidelity and Guaranty Company, do hereby certify that the above and foregoing is a full and correct copy of a resolution passed by the board of directors of the said company at a regular meeting thereof, duly called and held on the 11th day of July, A. D. 1898, a quorum being present, as the same appears on the records of the company now in my possession and custody as ass't secretary

In witness whereof, I have hereunto set my hand and affixed the seal of the said company at the city of Baltimore, Maryland, this the 3rd day of December, A. D. 1903.

[SEAL.]

RICH'D D. LONG,
Ass't Secretary.

STATE OF KENTUCKY, County of Franklin, } *sct:*

I, N. B. Smith, clerk of the county court for the county and State aforesaid, do certify that the foregoing power of attorney to
65 James H. Polsgrove was on this day produced to me in said county, certified as above, and lodged for record. Whereupon the same, together with the foregoing and this certificate, have been duly recorded in my office.

Given under my hand this 6th day of January, 1904.

N. B. SMITH, C. F. C. C.
By L. C. WALLACE, D. C.,

STATE OF KENTUCKY, County of Franklin, } *sct:*

I, N. B. Smith, clerk of the county court for the county and State aforesaid, do hereby certify that the above and foregoing is a full and correct copy of a power of attorney from the United States — Guaranty Company to James H. Polsgrove, as the same appears on the records now on file in my said office.

Given under my hand and seal of said court, at Frankfort, Kentucky, this 18th day of January, A. D. 1905.

[SEAL.] N. B. SMITH,
Clerk Franklin County Court, in the State of Kentucky.

66 And afterwards on the 17th day of January, 1905, there was filed in the office of the clerk of this court a præcipe, which is in words and figures as follows, to wit:

Præcipe.

Court of Appeals of Kentucky.

THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILway Company and Fred Milligan, Appellants,
vs.
GEORGE BOHON, Administrator of Edward Cook, Deceased, Appellee. } Præcipe.

Hon. J. Morgan Chinn, clerk court of appeals of Kentucky:

Please make transcript of the record herein, for use upon the writ of error to the Supreme Court of the United States, from the judgment of the court of appeals allowed herein, and in making said transcript you will omit the bill or bills of exceptions containing the evidence heard upon the trials in the court below, and will copy

otherwise the entire record, except said bill or bills of exception,
67 for use thereupon, and certify accordingly.

JOHN GALVIN,
MAURICE L. GALVIN,
E. H. GAITHER,
Attorneys for the Cincinnati, New Orleans & Texas Pacific Railway Company.

And afterwards on the 21st day of January, 1905, there was filed in the office of the clerk of this court, a notice of præcipe, which is in words and figures as follows:

Notice of Præcipe.

Court of Appeals of Kentucky.

THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILway Company, &c., Appellants,
vs.
GEORGE BOHON, Administrator of Edward Cook, Deceased, Appellee.
} Notice.

To George Bohon, administrator of Edward Cook, deceased:

68 You are hereby notified that we have this day filed with the clerk of the court of appeals of Kentucky, a præcipe, directing him to omit from the transcript of the record herein, to be made by him for use upon a writ of error to the Supreme Court of the United States, from a judgment of the court of appeals of Kentucky, the bill or bills of exceptions containing the evidence heard upon the trial or trials in the courts below, and to copy the entire record except said bill or bills of exceptions, for use thereupon, and to certify accordingly.

JOHN GALVIN,
MAURICE L. GALVIN,
E. H. GAITHER,
Attorneys for the Cincinnati, New Orleans & Texas Pacific Railway Company.

Service of the above notice by copy delivered this day, is hereby acknowledged on behalf of appellee, the defendant in error.

——— ———,
Attorneys for George Bohon, Administrator of Edward Cook, Deceased.

69 STATE OF KENTUCKY,
County of Mercer.

The affiant, E. H. Gaither, states that on the 18th day of January, 1905, he delivered to E. M. Hardin, one of the attorneys for George

Bohon, administrator of Edward Cook, deceased, defendant in error, a true copy of the attached notice, each of the attorneys for the defendant in error, declining to accept service thereof.

E. H. GAITHER.

Subscribed and sworn to before me by E. H. Gaither, this January 19th, 1905.

My commission expires March 23rd, 1908.

LOTTA LUNG,
Notary Public, Mercer County, Ky.

70 And afterwards on the 21st day of January, 1905, there was filed in the office of the clerk of this court, the original citation, which is hereto annexed, and is as follows:

71 UNITED STATES OF AMERICA:

The President of the United States to George Bohon, administrator of Edward Cook, deceased, and Fred Milligan, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, in the District of Columbia, on the 6th day of March next, pursuant to a writ of error filed in the clerk's office of the court of appeals of the State of Kentucky, wherein the Cincinnati, New Orleans & Texas Pacific Railway Company is plaintiff in error, and you are defendants in error, and to show cause, if any there be, why a judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 17th day of January in the year of our Lord one thousand, nine hundred and five, and of the Independence of the United States of America the one hundred and twenty-ninth.

(Signed) J. P. HOBSON,
Chief Justice, Court of Appeals of Kentucky.

We hereby accept service of the above citation, this — day of —— 1905.

—— ——,
—— ——,
Attorneys for George Bohon, Administrator of Edward Cook, Deceased, Defendant in Error.

72 STATE OF KENTUCKY, }
County of Mercer. }

The affiant, E. H. Gaither, states that on the 18th day of January 1905 he delivered to E. M. Hardin, one of the attorneys for George Bohon, administrator of Edward Cook, deceased, defendant in error,

a true copy of the attached citation, each of the attorneys for said defendant in error, declining to accept service thereof.

E. H. GAITHER.

Subscribed and sworn to before me by E. H. Gaither, this 19th day of January, 1905.

My commission expires, March 23rd 1908.

[Lotta Lung, Notary Public, Mercer Co., Ky.]

LOTTA LUNG,
Notary Public, Mercer County, Ky.

72½ [Endorsed:] Kentucky court of appeals. The C. N. O. & T. P. Ry. Co. *vs.* Geo. Bohon, adm'r of Edward Cook, dec'd. Citation. Filed Jan. 21, 1905. J. Morgan Chinn, C. C. A.

73 COMMONWEALTH OF KENTUCKY, Court of Appeals, } *sct:*

I, J. Morgan Chinn, clerk of the court of appeals of Kentucky, do hereby certify that the foregoing 228 pages, contained in volumes Nos. 1, 2, and 3, contain a full, true and complete copy of the transcript of the records and proceedings had in the court of appeals of the Commonwealth of Kentucky, including the opinions of said court in the several actions of the Cincinnati, New Orleans and Texas Pacific Railway Company, appellants, *vs.* Edward Cook's administrator, appellee, as full and complete as the same remain on file, and of record in my office, except bill or bills of exceptions containing the evidence heard upon the trials in the court below, which transcript I herewith transmit in pursuance of the command of the writ of error thereto attached.

I also further certify that the foregoing pages contain a full and complete copy and transcript of the notice, bond, order approving bond and allowing writ of error, power of attorney, præcipe and notice of præcipe.

74 I also certify that the original petition for writ of error, the assignment of errors, the writ of error, and the original citation with the affidavit of service thereon endorsed, are hereto attached and herewith returned.

In testimony whereof, I have hereunto set my hand, and affixed the seal of said court. Done at Frankfort, at the capitol, this the 6th day of February, A. D. 1905.

[Seal Kentucky Court of Appeals.]

J. MORGAN CHINN,
Clerk of the Court of Appeals of the
Commonwealth of Kentucky.

75 In the Supreme Court of the United States.

THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY Company, Plaintiff in Error,
vs.
GEORGE BOHON, Administrator of the Estate of Edward Cook, Deceased, Defendant in Error.

Writ of Error from the Court of Appeals of Kentucky.

Statements of Error Relied on and Designation of Parts of Record which Plaintiff in Error Desires Printed.

Comes now the plaintiff in error and files this statement of the errors on which it intends to rely, and the parts of the record which it intends to rely, and the parts of the record which it deems necessary for the consideration thereof, and asks the clerk of said court to have the same printed in the printed record thereof.

Errors Relied On.

Plaintiff in error will rely upon the four (4) errors assigned in its assignment of errors, contained on pages 52 and 53 of volume 3 of the record as certified to this court by the clerk of the court of appeals of Kentucky.

Parts of Record to be Printed.

The plaintiff in error thinks the following parts of the record necessary for the consideration of this cause upon the errors assigned, and asks the same to be printed, the pages designated being the pages of the record as certified to this court by the clerk of the court of appeals of Kentucky, to-wit:

76 1. Pleas before the court of appeals of Kentucky, page 1, vol. 1 of said record.

2. Petition of plaintiff, pages 2, 3, 4 and 5.

3. Order top of page 6, and the petition for removal, pages 6, 7, 8 and 9.

4. The bond for removal, pages 10 and 11, and the order with reference to the demurrer and response to petition for removal and said demurrer and resp-nse pages 11, 12 and 13.

5. Orders on pages 13, 14 and 15.

6. Answer of defendant Milligan, pages 16 and 17.

7. Answer of Cincinnati, New Orleans & Texas Pacific Railway Company, pages 18, 19, 20 and 21.

8. Order and demurrer to answer. Pages 21 and 22.

9. Order swearing jury, page 22.

10. Order May 25th, 1901, pages 23 and 24.

11. Motion for judgment *non obstante*, pages 24, 25 and 26.

12. Motion of Cincinnati, New Orleans & Texas Pacific Railway Company for a new trial, pages 26, 27 ond 28.

13. Order over ruling motions for judgment and for new trial, pages 30 and 31.

14. Order June 5th, 1901, page 31.

15. Order June 8th, 1901, page 31.

16. Order court of appeals of Kentucky, March 22nd, 1902 beginning middle of page 46 and page 47.

17. Opinion of court of appeals of Kentucky, pages 47 to 59 inclusive.

18. Order April 25th, 1902, over ruling petition for extension of opinion, page 62.

77 Also the following matters in the second volume of said record.

19. Copy of statement of second appeal, on page 1, of the said second volume.

20. Order of May 12th, 1902, and mandate, pages 33 and 34 of said second volume.

21. Order and judgment, pages 38 and 39, and order concerning motion for new trial, page 39.

22. Order over-ruling motion, page- 41 and 42.

23. Orders with reference to bill of exceptions, pages 42 and top of page 43.

24. Judgment and opinion of court of appeals of Kentucky, pages 55 to 61 inclusive.

25. Ruling of court of appeals upon petition for rehearing, pages 88 to 90 inclusive.

Also, the following matters in volume 3 of said record.

26. Page 1, pleas before the court of appeals, showing third appeal.

Also, the order in Mercer circuit court, showing filing of mandate, pages 1, 2 and 3 of said volume 3.

27. Order, verdict and judgment, bottom of page 8 and page 9.

28. Order showing defendant filed motion and ground for new trial, page 9.

29. Judgment on motion and grounds for new trial, pages 11 and 12.

30. Order signing bill of exceptions, page 12.

31. Judgment and opinion of the court of appeals, 7th day of December, 1904, pages 28 to 32 inclusive.

32. Order over ruling petition for rehearing, page 46.

78 33. Order concerning notice in severance, page 46.

34. Summons in severance, pages 47 and 48.

35. Order with reference to petition for writ of error page 48, petition for writ of error, pages 49 and 50.

36. Order filing assignment of errors, page 51, and said assignment of errors, pages 52 and 53.

37. Order allowing the writ of error, page 54, and said writ of error, pages 56 and 57.

38. Order filing bond and bond, pages 58 to 65 inclusive.

39. Order for præcipe and notice concerning same, pages 66 to 69 inclusive.

40. Order filing citation and said citation, pages 70, 71 and 72.
41. Certificate of the clerk of the court of appeals of Kentucky, pages 73 and 74.

All of which is respectfully suggested and submitted.

EDWARD COLSTON,
JOHN GALVIN,
Attorneys for Plaintiff in Error.

We, the undersigned, attorneys for defendant in error, do hereby acknowledge service of copy of the above and foregoing statement upon us, this — day of —— 1905.

—— ——,
—— ——,
Attorneys for Defendant in Error.

79 STATE OF KENTUCKY, }
County of Mercer. }

The affiant, E. H. Gaither states that he executed the attached notice by delivering an exact copy of the attached notice to E. M. Hardin, one of the attorneys for Edward Cook's administrator, defendant in error, in Harrodsburg, Kentucky, on March 3rd 1905, and by delivering to Robert Harding, one of the attorneys for said defendant in error an exact copy of said notice, on March 7th 1905, in Burgin, Mercer county, Kentucky.

This March 8th 1905.

E. H. GAITHER.

Subscribed and sworn to before me by E. H. Gaither, this March 8th 1905.

My commission expires, March 3rd 1908.

[Seal Lotta Lung, Notary Public, Mercer Co., Ky.]

LOTTA LUNG,
Notary Public, Mercer County, Kentucky.

80 [Endorsed:] (1) 529 19629 Mar. 13, '05 Supreme Court of the U. S. The C. N. O. & T. P. Ry. Co. *vs.* George Bohon, adm'r of Edward Cook.

81 [Endorsed:] File No. 19,629. Supreme Court U. S. October term, 1904 Term No. 529. The Cincinnati, New Orleans & Texas Pacific Ry. Co., pl'ff in error, *vs.* George Bohon, adm'r &c. Statement by counsel for plaintiff in error of errors relied on and designation of parts of record to be printed and affidavit as to service of copy of same. Filed March 13th, 1905.

Endorsed on cover: File No. 19,629. Kentucky court of appeals. Term No. 177 The Cincinnati, New Orleans & Texas Pacific Railway Company, plaintiff in error, *vs.* George Bohon, administrator of Edward Cook, deceased, and Fred Milligan. Filed February 13th, 1905. File No. 19,629.

Office Supreme Court U. S.
FILED
DEC 15 1905
JAMES H. McKENNEY,
Clerk.

FILE COPY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 177.

THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

GEORGE BOHON, ADMINISTRATOR OF EDWARD COOK, DECEASED, DEFENDANT IN ERROR.

BRIEF FOR THE PLAINTIFF IN ERROR.

JOHN GALVIN,
Attorney for the Plaintiff in Error.

EDWARD COLSTON,
Of Counsel.

(19,629.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 177.

THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

GEORGE BOHON, ADMINISTRATOR OF EDWARD COOK, DECEASED.

BRIEF FOR THE PLAINTIFF IN ERROR.

STATEMENT OF CASE.

This action was brought February 23, 1901, by the defendant in error, George Bohon, administrator of Edward Cook, deceased, against The Cincinnati, New Orleans and Texas Pacific Ry. Co., the plaintiff in error, and one Fred Milligan, in the circuit court of Mercer county, Kentucky, to recover damages for the death of said Edward Cook. Cook was a switchman in the service of the plaintiff in error at its yards in Burgin, Kentucky, and was killed while attempting to pass between two cars which he had just uncoupled or cut apart by the cars coming together and crushing him. In the petition it was charged that this was due wholly and solely to the negligence of Milligan, who was the engineer

operating the engine attached to the train of which the two cars referred to were a part. The only allegation of negligence in the petition is in the following language (page 2, Printed Record):

> "Plaintiff avers that on said — day of ——, 1901, his intestate, Edward Cook, as brakeman and switchman aforesaid, for defendant Cin., New Orleans & T. P. Ry. Co., was engaged in said yard uncoupling and giving attention to defendant's cars for said defendant, which cars were in said defendant's train with engine attached to move and guide same, and the defendant Fred Milligan was at the time in the employment of said defendant company as engineer and engaged in managing, operating and controlling said train and engine for said def't Co. and while plaintiff's intestate was engaged as aforesaid, the def't C., N. O. & T. P. Ry. Co. and the def't Milligan caught and crushed said Cook's body between the cars of said train *by and through the gross carelessness and negligence of said Mulligan* as engineer of said defendant Co. in the operation, management and movement of its said engine and train at said time and place for said def't company, so injuring him that he died within a few minutes thereafter, and when so caught and crushed said Cook was engaged in discharging his duties as said brakeman to said defendant company; and said death of said Cook was caused *as aforesaid* by the gross carelessness and negligence of the defendant, The C., N. O. & T. P. Ry. Co. and Fred Milligan." (Italics ours.)

Before answer to said petition was due the Cincinnati, New Orleans and Texas Pacific Ry. Co. filed (page 3, Printed Record) in said circuit court its petition for the removal of the cause into the circuit court of the United States for the eastern district of Kentucky, accompanied by an appropriate bond, which was approved by the court. The petition for removal alleged that there was a separable controversy between the petitioner, a resident and citizen of Ohio, and the

defendant in error, who was a resident and citizen of Kentucky.

The Mercer circuit court made an order refusing to permit the removal, and required the defendants to plead, and then put them to trial, resulting in a verdict and judgment for the defendant in error for $8,000. An appeal was prosecuted to the court of appeals of the State, and one of the errors relied upon was the refusal of the circuit court to permit the removal to the United States court (page 13, Printed Record). Upon that question the court of appeals decided against plaintiff in error (see opinion of the court, pages 16 and 17, Printed Record herein), but reversed and set aside the judgment for other errors in the trial and remanded the case for another trial. On the second trial a verdict and judgment was entered in favor of the defendant in error herein for $7,000, and upon appeal to the court of appeals that was reversed and set aside and the cause remanded for another trial (page 25, Record). On the third trial a verdict and judgment for $5,000 was rendered against this plaintiff in error, and upon the third appeal to the court of appeals of the State that judgment was affirmed (Record, pages 32 and 33).

The Federal question, of course, was preserved throughout the whole case, the court in its last opinion (page 33, Record) saying:

> "Appellant asks a reversal for other reasons, but the questions raised were settled by the former opinions."

A petition for rehearing was afterwards overruled, so that the judgment became final so far as the State courts of Kentucky are concerned, and thereupon a writ of error was taken to this court and an assignment of errors filed (Record, page 36).

The assignments of error are as follows:

ASSIGNMENT OF ERRORS.

1. The court erred in affirming the judgment of the Mercer circuit court of Kentucky, whereas it should have reversed the same, with directions not to proceed in the said cause.

2. The court erred in holding in substance and effect that the Cincinnati, New Orleans and Texas Pacific Railway Company had no right, under the Constitution and laws of the United States, to remove this cause pending in the Mercer circuit court against it to the circuit court of the United States for the eastern district of Kentucky, and that the said The Cincinnati, New Orleans and Texas Pacific Railway Company had no right, under the Constitution and laws of the United States, to have the said cause removed as aforesaid.

3. The court erred in holding that the Mercer circuit court had any right to proceed any further in the said cause after the petition to remove the same on behalf of the Cincinnati, New Orleans and Texas Pacific Railway Company had been filed in the said Mercer circuit court.

4. The court erred in holding that the proceedings in the Mercer circuit court after the filing of the petition of the Cincinnati, New Orleans and Texas Pacific Railway Company therein for the removal of the said cause to the circuit court of the United States for the eastern district of Kentucky were not void and of no force and effect as against the said The Cincinnati, New Orleans and Texas Pacific Railway Company.

These assignments may be condensed into one question, as follows:

Did the Mercer circuit court and the Kentucky court of appeals err in refusing to permit the removal of this cause

to the United States court upon the filing of the petition for removal by this plaintiff in error? And that involves simply the questions certified to this court by the sixth circuit court of appeals and now under submission upon argument had a few weeks ago in the case of Alabama Great Southern R. R. Co. *vs.* H. G. Thompson, administrator of Florence James, No. 58 of the present term (changing the question slightly to fit the facts of this case), as follows:

1. May a railroad corporation be jointly sued with one of its servants, the engineer of one of its trains, when it is sought to make the corporation liable only by reason of the negligent act of said engineer in the operation of a train under his management and control, solely upon the ground of the responsibility of a principal for the act of his servant, though not personally present or directing and not charged with any concurrent act of negligence?

2. Is such a suit removable by the corporation, as a separable controversy, when the amount involved, exclusive of interest and costs, exceeds $2,000, and the requisite diversity of citizenship exists between said company and the plaintiff, the citizenship of the engineer sued with the company being the same as that of the plaintiff?

ARGUMENT.

As has just been stated, the question involved here is exactly the one involved in case No. 58 on the docket of the present term of the court and submitted upon briefs and arguments a few weeks ago. In brief, the question is whether there is a joint cause of action against the railroad company and its engineer, where the cause of action stated is the negligence of the engineer alone in the operation of his train, without any act or omission, expressed or implied, in the company itself.

Parties cannot be guilty of a joint tort unless each has contributed to the harmful result. In the present case, as in the Thompson case just referred to, the company itself was not an actor in the thing which caused the injury. Its sole responsibility is because in law it is surety for the conduct of its servant. On that account alone it is sued. Does such responsibility make it proper to join such servant with the company in an action? In other words, the servant being responsible for his own act and the master being responsible on the doctrine of law *respondeat superior*, can the liability against both be enforced in one action?

It is contended on the other side that the case of C. & O. Ry. Co. *vs.* Dixon, 179 U. S., 131, determines this question, but our contention is that this court in that case expressly declined to determine the question involved in this case, stating that that question had been decided by the Kentucky court of appeals, but that the case was decided here "on other considerations." We insist, therefore, that that case by implication, at least, decides the question now involved in favor of our contention because this court refused to follow the reasoning of the Kentucky court of appeals, holding that a joint cause of action did exist where the negligence charged was that of the servant only.

This court in the Dixon case held that it could not be properly said that it appeared on the face of the pleadings in that case as a matter of law that the cause of action was entire, or that a separable controversy was presented, because under the construction placed upon the petition it contained a charge of negligence against the master separate from the charge of negligence against the servant, and that these two acts concurring caused the injury.

Without taking the time or space to repeat the argument of Mr. Edward Colston for the plaintiff in error in the case of Alabama Great Southern R. R. Co. *vs.* Thompson, heretofore referred to, we beg to adopt the arguments and authorities therein cited in support of our position in

this case, and to especially call the court's attention to the following cases without further comment upon them:

Mulchey *vs.* Methodist Religious Society, 125 Mass., 847.

Parsons *vs.* Winchell, 5 Cush., 592.

Warax *vs.* The C., N. O. & T. P. Ry. Co., 72 Fed. R., 637.

Hukill *vs.* The C. & O. Ry. Co., 72 Fed., 745.

Pomeroy on Code Remedies, 4th ed., secs. 208–209.

Bliss on Code Pleading, 3d ed., sec. 83.

17 Am. & Eng. Ency. of Law, 602.

Bailey *vs.* Bussing, 37 Conn., 349.

Page *vs.* Parker, 40 N. H., 47.

Clark *vs.* Fry, 8 Ohio St., 377.

Bennett *vs.* Fifield, 13 R. I., 139.

Campbell *vs.* Portland Sugar Co., 62 Me., 552.

Helms *vs.* No. Pac. Ry. Co., 120 Fed. R., 389.

Davenport *vs.* Southern Ry., 124 Fed R., 983.

Gustafson *vs.* Chicago, R. I. & P. Ry., 128 Fed. R., 87–88.

McIntyre *vs.* Southern Ry. Co., 131 Fed. Rep., 985.

DO FEDERAL OR STATE STATUTES AND CONSTRUCTIONS GOVERN?

Mr. Edmund F. Trabue, of Louisville, Ky., filed a brief in the Alabama Great Southern Railway case, No. 58 on the docket of this term, discussing the question as to whether the judgment of Federal courts or that of the State courts must be the criterion in determining whether a cause is removable or not and in determining whether a joint cause of action is stated or not in a case like the present. And we now herewith submit and repeat the argument presented by him in that brief, as follows:

Our contention here submitted is that the construction of *section 2 of the act of March 3, 1887*, reaffirmed *August 13, 1888*, presents a *Federal* and not a *State* question. That, accordingly, the judgment of *Federal courts* and not of *State courts* must be the criterion. This act of Congress confers a right of removal in certain specified cases, and the State legislatures have no power to alter, amend, or, forsooth, to abolish this Federal right, directly or by indirection. They have no right to add to nor subtract from the rights of any litigant under this statute. This act of Congress is complete in itself; it provides for removal in a certain situation, to wit, when in a suit there be *a controversy wholly between citizens of different States which can be fully determined as between them alone.* This statute confers the right of removal, and was passed for that express purpose upon a nonresident citizen finding himself involved in a controversy with a citizen of the State of the forum when the controversy is one determinable between them alone. This provision takes no account of *who may be parties to the action or suit in which the controversy be found*, nor of *what may be the rules of practice, whether common law or statutory, of the State in which the action or suit may be pending.* Indeed, the statute seems to defy State procedure, for the hypothesis upon which it is based is that there may be a separable controversy in a suit properly brought and rightly pending in the State court. If properly brought there all the parties to the suit are properly joined in the suit and this controversy is properly joined with any other controversies therein nevertheless, the whole case is removable to the Federal court, *regardless of the State practice permitting the joinder of all the parties litigant and of all the controversies involved.* Indeed, in the *Removal Cases, 100 U. S., 457, 468, 25 L. Ed., 593, 598, and Blake vs. McKim, 103 U. S., 336, Book 26, pp. 563–4*, this court held that in a controversy between citizens of different States either party might remove the case—

> " without regard to the position they occupy in the pleadings as plaintiffs or defendants. For the pur-

pose of a removal, the matter in dispute may be ascertained, and the parties to the suit arranged on opposite sides of that dispute."

In *Evers vs. Watson, 156 U. S., 527, 39 L. Ed., 520*, this court held that under the power to rearrange the parties and place them on different sides of the matter in dispute according to the actual facts it would be presumed, in the absence from the record of the petition for removal, in order to sustain Federal jurisdiction, that the court did so arrange the parties.

In *Barney vs. Latham, 103 U. S., 205, 26 L. Ed., 514*, this court held that when a removal of a separable controversy was effected the entire suit was removed to the Federal court, and that the right of removal was not affected by the fact that a defendant, a citizen of the same State as plaintiff, might be a proper but not an indispensable party to the separable controversy between citizens of different States.

These decisions proceed upon the idea that a controversy between two persons, citizens of different States, may exist in any suit and be separable from the rest of the suit and determinable between those two persons of diverse citizenship, and in so determining no account whatever is taken of whether in the State court such controversy would be regarded as separable from the rest of the suit or as determinable between the petitioner for removal and his adversary in the controversy alone. Indeed, the practice in the State court might be settled by judicial decision or by statute and require all persons in anywise interested to be made parties to the suit, and nevertheless, under the decisions just cited, the right of removal would certainly exist if only there were in the suit the separable controversy determinable between the petitioner and his adversary alone—citizens of different States. There is no intimation that such controversy must be separable according to any rule of practice in the State court, nor that the question whether or not it might be de-

termined without the presence of other persons must be decided according to State practice; *e contra*, the conclusion from the decisions just noted is that the controversy may be separable and its determinability between the parties only exist regardless of what the State court might require as to joinder of different persons, although, possibly, it might have been otherwise "under the old law" ("*11 Wall., 174*"). The statute is meant to operate in all the States, and nevertheless the practice in any of those States may differ from that in any other State. There is no intimation in the statute that the separableness of the controversy or its determinability between the citizens is to be determined by the practice or the statutes of any State.

Conformably with the view we present, it is uniformly held that Federal jurisdiction cannot be abridged or modified by any State statute.

In *Hyde vs. Stone, 20 Howard, 173, 15 L. Ed., 874*, this court said:

> "But this court has repeatedly decided that the jurisdiction of the courts of the United States over controversies between citizens of different States cannot be impaired by the laws of the States which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power."

In *Smyth vs. Ames, 169 U. S., 466, 42 L. Ed., 819*, plaintiffs sued on behalf of themselves and all others similarly situated as stockholders to prevent their corporation enforcing illegal rates causing loss to the company. This court, considering the application of the 94th rule, said that it was contended that plaintiffs' remedy at law was adequate and the Federal chancellor without jurisdiction because the Nebraska statute authorized a railroad company to show that the rates therein prescribed were unreasonable and unjust, and, if so found, to obtain an order to raise the rates, etc., and that the existence of this adequate remedy deprived the Federal chancellor of jurisdiction, but said:

> "We cannot accept this view of the equity jurisdiction of the circuit courts of the United States. The adequacy or inadequacy of the remedy at law for the protection of the rights of one entitled upon any ground to invoke the powers of the Federal court is not to be conclusively determined by the statutes of the particular State in which suit may be brought, etc." (*p. 516*).

We submit that the right of removal is as immune from regulation by State statute as is the right of resort to Federal equity jurisdiction.

In *Brow vs. Wabash, 164 U. S., 271, 41 L. Ed., 431*, this court held that a petition for removal did not waive irregularity in the service of process in an action for personal injury against a railroad company.

We contend that to hold that the question of separable controversy must be determined by the criterion of State practice is inconsistent with the spirit of the decisions just invoked and makes Federal jurisdiction the creature of State legislation, existing or not existing accordingly as the legislature may mould the State practice with a view of preventing removal from the State court.

There is a single instance found in the removal act wherein State practice is controlling, to wit, the enactment as to the time when the petition for removal must be filed, viz., when the defendant is required by the *State law and rules of the State court* to answer the complaint. In this instance the State may absolutely control the time when the petition for removal must be filed, but may do so not by virtue of State power, but by permission of Congress expressly conferred in the act itself. This is the only instance in which any power or authority to affect in any manner the right of removal is conferred by the statute upon any State tribunal, and the grant of the right in this instance excludes the idea that it is granted in any other particular.

This discussion naturally leads to the question of whether the State statute of Kentucky gives a joint cause of action

against a railroad company and its servant in a case like this, and whether the Kentucky court of appeals has so construed the Kentucky statute. It has been claimed that it did so construe the Kentucky statute in its first opinion in this case (pages 16 and 17, Printed Record herein), and also in the case of I. C. R. R. Co. *vs.* Winston's Administrator, 23 Ky. L. Rep., 1283. A reading of these opinions, however, will show that the Kentucky court of appeals reached the conclusion that, under the common law, a joint cause of action existed and could be stated against the master and servant in a case like the present, and that applying that construction of the common law to the statute authorizing a recovery for death it was held that under that statute a joint cause of action could be maintained against the master and servant. This, however, is no more a construction of the statute than any other construction of the right to recover under that statute, as, for illustration, where the Kentucky court of appeals might hold that two servants of the master were not fellow-servants, and that a petition charging death of one servant through the negligence of another states a cause of action, although in other jurisdictions the same servants might be held to be fellow-servants and on the same allegation no cause of action be stated. It certainly cannot be seriously claimed that a construction of the Kentucky court of appeals as to what constitute fellow-servants would be read into the statute authorizing a recovery for death. In the same way and for the same reason there cannot be read into that statute the construction of the Kentucky court as to what constitutes a joint cause of action.

In addition to the authorities referred to by Mr. Trabue and heretofore quoted and adopted herein, I beg to call the court's attention to the following language of this court in the case of Madisonville, &c., Co. *vs.* St. Bernard, 196 U. S., 253:

> "A State cannot, by any statutory provisions, withdraw from the cognizance of the Federal courts, a

suit or judicial proceeding in which there is a controversy " between citizens of different States.

IF NO CAUSE OF ACTION IS STATED AGAINST ONE DEFENDANT, THERE CAN BE NO JOINT CAUSE OF ACTION AGAINST TWO.

It has been repeatedly held in many courts, and no place more squarely than by the Kentucky court of appeals, that if in a petition against the master and servant no cause of action is stated against the servant that the master may remove to the Federal court if he be a non-resident.

C., N. O. & T. P. R. R. Co. *vs.* Robertson, 25 Ky. L. Rep., 265.

Davis *vs.* C. & O. Ry. Co., 116 Ky., 144.

The converse of this proposition must be equally true—that is to say, if no cause of action is stated in such a petition against the master, certainly no joint cause of action is stated against the master and the servant. There would, however, of course, be a controversy between the master and the plaintiff in the action, and if the master was a resident of a different State he would unquestionably have a right to remove the cause to the United States court and there have determined the question of his liability.

In the case at bar it is alleged that Cook, for whose death the action is brought, was a switchman in the service of the defendant company, and that the other defendant, Milligan, was the engineer in charge of the engine moving the train in which Cook was acting as switchman; and it is further charged that Cook received his injuries and met his death by and through the negligent act of the engineer, Milligan. It needs no citation of authorities in this court at least to establish the principle that a switchman and engineer are fellow-servants, and that a demurrer to this petition by the railroad company must have been sustained in any Federal court unless there happened to be a fellow-servant statute

in the State. There is no fellow-servant statute in Kentucky, and whatever may be the Kentucky construction of the relation as fellow-servants between the engineer and the switchman the Federal rule is that they are fellow-servants, and under the argument heretofore made, that it is the Federal construction or rule and not the State construction or rule which must govern in determining rights under the Federal statute authorizing removal, it follows that no cause of action is stated against the railroad company, and therefore no joint cause of action against the railroad company and Milligan, and for that reason the removal was proper.

This brief was very hurriedly and unexpectedly prepared, and we hope to have the privilege of filing a fuller and better brief, but we earnestly insist:

First. That under the allegation of petition in this case charging negligence *by and through* the act of the engineer alone no joint cause of action is stated, or, to express this thought in other words, all authorities up to the present time hold that the question of joint liability in cases of tort depend upon personal participation of the defendants, which participation may consist in their taking part in the commission of the act or commanding it to be done or ratifying it; it follows, therefore, from this that the fictitious participation of a master embodied in the doctrine of law making him liable for the act of a servant done in disobedience of his command does not amount to any participation of the master in the wrongful act of the servant, and cannot be the foundation of a joint liability with the servant;

Second. The removal act provides for the removal of a separable controversy, and certainly means such a controversy as a fair and just construction of that act of Congress would decide to be separable—that is, one that could be fully determined between the parties in question, and not such controversies only as the State courts or State legislatures might declare separable when, perhaps, so contriving as to prevent removal to the Federal courts; and,

Third. Under the Federal rule, no cause of action being stated against the railroad company in this case, no joint cause of action is stated against the company and its servant, and therefore, for that reason, the action is removable.

Respectfully submitted.

JOHN GALVIN,
Attorney for Plaintiff in Error.

EDWARD COLSTON,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1905.

No. 177

THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

GEORGE BOHON, ADMINISTRATOR OF EDWARD COOK,
DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

JOHN W. YERKES,
For Defendant in Error.

ROBERT HARDING,
Of Counsel.

19488 JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C.

Supreme Court of the United States.

THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, *Plaintiff in Error,*

vs.

GEORGE BOHON, ADMINISTRATOR OF EDWARD COOK, *Defendant in Error.*

Brief for Defendant in Error.

STATEMENT.

This is an action instituted by the defendant in error in the Mercer Circuit Court, in the State of Kentucky, to recover damages for the death of Edward Cook, caused by the joint negligence of the plaintiff in error and its engineer, Fred Milligan. The plaintiff in error and its engineer are made jointly liable, for causing his death by negligence, under section 241 of the Kentucky Constitution and section 6 of the Kentucky Statutes.

Section 241 of the Constitution, reads thus:

> "Whenever the death of a person shall result from an injury inflicted by negligence, or wrongful act, then in every such case damages may be recovered for such death from the persons and corporations so causing same."

Section 6 of the Kentucky Statutes, reads thus:

> "Whenever the death of a person shall result from an injury inflicted by negligence, or wrongful act, then in every such case damages may be recovered for such death from the person or persons, company or companies, corporation or corporations, their agents or servants, causing the same, and when the act is willful or the negligence is gross, punitive damages may be recovered and the action to recover such damages shall be prosecuted by the personal representative of the deceased."

It was tried three times in that court and also heard the same number of times in the Kentucky Court of Appeals. The first trial resulted in a verdict and judgment for $8,000, the second in a verdict of $7,000, and the third in a verdict of $5,000 for the defendant in error, against the plaintiff in error, and Fred Milligan, its engineer.

The judgments upon the first and second verdicts were reversed and the third one affirmed upon the appeal taken each time by the company.

The question before this Court is, did the two Kentucky courts properly rule the law in refusing to transfer this action from the Mercer Circuit Court to the United States Circuit Court for the District of Kentucky.

Each of these courts held, when this question was made upon the first trial, that the petition for removal did not state the jurisdictional facts, taken in connection with the record then made in the State Court, that required that Court to surrender its jurisdiction of this cause of action.

The Court of Appeals opinion on that question will be found on pages 16 and 17 of the transcript of the record, and is as follows:

"This action was filed on February 23, 1901, by appellee, to recover for the death of his intestate against the Cincinnati, New Orleans & Texas Pacific Railway Co., and Fred Milligan, who was an engineer in its service. It was charged in the petition that the death of the intestate was due to the negligence of Milligan, as engineer in the service of the railroad company, in moving a train under his charge. At the May term of the Circuit Court the railroad company filed a petition for removal of the case to the Circuit Court of the United States, alleging that it is a resident of the State of Ohio, and that Milligan was improperly joined with it as a co-defendant, for the fraudulent purpose of defeating the jurisdiction of the United States Court. The court overruled the motion, and this is the first question to be determined on the appeal.

It is earnestly maintained that the joinder of the defendants is improper; that for the one act of the servant he can not be sued jointly with his master, and that his act must be treated either as that of an individual, or that of an agent. In support of his position we are referred to several cases outside of this State so holding. But the decided weight of authority is the other way. (15 Encyclopædia of Pleading and Practice, 560; 1 Thompson on Negligence, 611.)

The conflict in authority on the question seems to be due largely to differences of the common law forms of

pleading, which no longer exist in this State. In Pomeroy on Remedies and Remedial Rights, section 307, it is said:

"In general those who have united in the commission of a tort to the person or to the property, whether the injury be done by force or be the result of negligence or want of skill, or of fraud and deceit, are liable to the injured party without any restriction or limit upon his choice of defendants against whom he may proceed. He may at his option sue all the wrong-doers in a single action, or may sue anyone, or may sue each in a separate action, or may sue any number he pleases less than all; the fullest liberty is given him in this respect. The only exceptions are those few instances in which the tort, from its very nature, must be a separate act, impossible to be committed by two or more jointly. A sheriff and his deputy may be sued jointly for the trespasses and other wrongful acts done by the latter in his official capacity; the deputy, because he actually commits the tort; and the sheriff, because he is the principal."

In a note to this a number of cases are collected, and among other illustrations these are given: "An action against principal and agent for negligence of the agent. * * * An action against one partner for negligence by the firm." (Bliss on Code Pleading, section 83).

This rule was followed by this Court in C. & O. Railway Co. *v.* Dixon's Adm'r, 104 Ky., 608, and in Illinois Central Railroad Co. *v.* Winston's Adm'r, and in the latter case the Court, after quoting section 6, Kentucky Statutes, giving the right of action in such cases, said:

"By the terms of this section, where death results from the negligent act, a recovery may be had therefor against the person or persons, company or companies, corporation or corporations, their agents or servants, causing the same. * * * The plaintiff has a right to proceed severally or jointly against those who are liable for the injury inflicted resulting in death."

We are, therefore, of the opinion that the Circuit Court properly refused to remove the case to the Federal Court.

The facts constituting the negligence, resulting in Cook's death, may be found on pages 17, 18 and 19 of the transcript of record written into the opinion of the Court of Appeals, but we do not set them out in the statement of this case, as they can not be considered in determining the question of removal to the Federal Court. That question, as we understand the ruling of this Court, is to be determined alone upon the record in the State Court, taken in connection with the allegations of the petition for removal, at the time it is filed.

The petition for removal may be found on pages 3 and 4 of the transcript of record, and reads thus:

"*To the Honorable Judge of the Mercer Circuit Court:*

"Your petitioner, the Cincinnati, New Orleans & Texas Pacific Railway Company, says it is a defendant in the above-entitled suit; that the matter and amount in dispute in said action involves, exclusive of interest and costs, an amount to exceed the sum or value of $2,000; that said suit is a civil action to recover $30,000

damages for the alleged wrongful death of plaintiff's decedent, Edward Cook, through the alleged negligence of the defendant, Fred Milligan, as engineer of this petitioner, in the management, movement and operation of an engine and train of your petitioner; that there is in said suit a controversy wholly between residents of different States, which can be fully determined as between them—that is to say, between your petitioner, the Cincinnati, New Orleans & Texas Pacific Railway Company, defendant in said suit, who avers that at the commencement of said suit it was and still is a corporation organized under the laws of the State of Ohio, and of no other State, and that it was then and still is a resident and citizen of said State of Ohio, and of no other State, and that it was not then and is not now either a resident or citizen of the State of Kentucky, and the plaintiff, George Bohon, administrator of Edward Cook, deceased, who was at the commencement of this suit and still is a resident and citizen of the State of Kentucky.

"Your petitioner further says that in this suit said plaintiff has fraudulently and improperly joined, as a co-defendant, with your petitioner herein, one Fred Milligan, who is a citizen of the State of Kentucky, and your petitioner says that Fred Milligan has been fraudulently and improperly joined as a co-defendant in this suit, because of the fact that he is a resident of the State of Kentucky, and for the sole purpose of defeating the jurisdiction of the United States Court.

"Your petitioner offers herewith a bond with good and sufficient security thereto, conditioned according to law,

for its entering into the United States Circuit Court for the District of Kentucky, being the proper District, on the first day of its next term, a copy of the record in this suit, and for paying of all costs that may be awarded by said United States Circuit Court, if the Court should hold that this suit was wrongfully or improperly removed thereto.

"Your petitioner prays this honorable Court to proceed no further herein, except to make the order of removal required by law, and to approve said surety and bond, and to cause the record herein to be removed into said United States Circuit Court for the District of Kentucky, and it will ever pray."

The petition of the defendant in error may be found on pages 1 and 2 of the transcript of record and reads thus:

"The plaintiff, George Bohon, administrator of Edward Cook, deceased, states that on the —— day of ———, 1901, he was by order of the Mercer County Court duly and regularly appointed administrator of Edward Cook, deceased, who died in said County of Mercer on the —— day of ———, 1901, intestate as hereinafter stated, and at the time of his death was a citizen and resident of said county.

"Plaintiff avers that he executed bond, with surety approved by said Court as administrator aforesaid, and took the oath required by law, and entered upon his duties as such administrator.

"Plaintiff avers that the defendant, the Cincinnati, New Orleans & Texas Pacific Railway Company is a

common carrier and corporation engaged in operating under a lease from the owners thereof, a railroad, a portion of which lies within and runs through Mercer County, Kentucky, and the defendant Fred Milligan, is a citizen and resident of Mercer County, Kentucky.

"Plaintiff avers that on the —— day of ————, 1901, his intestate, Edward Cook, was a brakeman and switchman in the employment of the defendant, The Cincinnati, New Orleans & Texas Pacific Railway Company, and engaged as such brakeman and switchman for the defendant in discharging his duties to said defendant in its yard at Burgin, Mercer County, Kentucky.

"Plaintiff avers that on the said —— day of ———, 1901, his intestate Edward Cook, as brakeman, and switchman, aforesaid, for defendant—Cincinnati, New Orleans & Texas Pacific Railway Company—was engaged in said yard uncoupling and giving attention to defendant's cars for said defendant, which cars were in said defendant's train with engine attached to move and guide same, and the defendant, Fred Milligan, was at the time in the employment of said defendant company as engineer and engaged in managing and operating and controlling said train and its engine for said defendant company, and while plaintiff's intestate was engaged as aforesaid on said date, the defendant, Cincinnati New Orleans & Texas Pacific Railway Company, and the defendant, Fred Milligan, caught and crushed said Cook's body between the cars of said train by and through the gross carelessness and negligence of said Milligan as engineer of said defendant company in the management, movement and operation of its said engine and train at

said time and place for said defendant company, thereby so injuring him that he died within a few minutes thereafter, and when so caught and crushed said Cook was engaged in discharging his duties as said brakeman to said defendant company; and said death of said Cook was caused as aforesaid by the gross carelessness and negligence of the defendants, The Cincinnati, New Orleans & Texas Pacific Railway Company and Fred Milligan, and plaintiff has been damaged thereby in the sum of thirty thousand dollars ($30,000).

"Wherefore, plaintiff prays judgment against the defendants, The Cincinnati, New Orleans & Texas Pacific Railway Company and Fred Milligan, for $30,000 in damages, and his cost herein expended, and for all proper relief."

The demurrer and response to petition for removal entered May 14, 1901, may be found on pages 5 and 6 of the transcript of record and reads thus:

"The Plaintiff, George Bohon, administrator of Edward Cook, deceased, demurs to the petition for removal of this cause to the United States court filed April 11, 1901, because same does not state facts sufficient to authorize this Court to remove this cause of action to the United States court.

"Wherefore," etc.

"The plaintiff not waiving his demurrer herein, but insisting on same, for answer to defendant's petition for removal of this cause in the United States court, denies that there is in said suit a controversy wholly between resid ents of different States, and denies that in this suit

Plaintiff has fraudulently or improperly joined as co-defendant with the petitioner herein, one Fred Milligan, and denies that said Fred Milligan has been fraudulently or improperly joined as co-defendant in this suit, or for the sole purpose or any purpose of defeating the jurisdiction of the United States court.

"Wherefore the Plaintiff prays the Court for an order refusing to grant a removal of this cause to the United States court."

The two orders of Court in regard to the approval of the bond of the petitioner may be found on pages 6 and 7 of the transcript of record. One of these orders was entered before and one of them after the order refusing to transfer the case had been entered by the Court.

It would seem that the surety on the bond did not execute it until after the petition for removal and motion to transfer had been overruled.

These three orders read thus:

1st. "This day came defendant and executed bond for removal of this cause to the United States Circuit Court, with C. D. Thompson security, which bond is approved by the Court."

2nd. "This cause having been submitted to the Court upon the petition of the defendant, the Cincinnati, New Orleans & Texas Pacific Railway Company, for the removal of this said cause to the United States District Court, and the court, being advised, overrules the motion and petition of the defendants for said removal, to all of which the defendant, Cincinnati, New Orleans & Texas Pacific Railway Company excepted and still excepts."

3d. "The bond heretofore executed by the defendant, Cincinnati, New Orleans & Texas Pacific Railway Company, and filed with the petition for removal was this day presented by the defendant to the court for approval, and C. D. Thompson, the surety on said bond, appearing in open court acknowledged the execution by him of same, said bond is now approved. This order is made in lieu of the previous order entered on this day record showing that the bond was not executed until this day."

Thus the record was made up in the State court when the petition for removal was filed and the order refusing to remove the case was entered.

Argument.

The plaintiff in error, on page 36 of transcript of record, sets out four separate assignments of error, but as they involve the same question in effect we will not discuss them separately.

The question presented is, did the Circuit and Appellate Courts of Kentucky properly decline to surrender jurisdiction to try and determine the cause of action set out in the petition of the defendant in error?

This question must be determined by the record in the State court at the time the petition for removal was filed, taken in connection with the allegations of the petition for removal.

In Powers *v.* Chesapeake & Ohio Ry. Co., 169 U. S., 42 this Court said in its opinion by Mr. Justice Gray in January, 1898:

"A petition for removal, when presented to the State Court, becomes part of the record of that Court, and must doubtless show, taken in connection with the other matters on that record, *the jurisdictional facts* upon which the right of removal depends; because, if *those facts are not made to appear upon the record of that Court, it is not bound* or *authorized to surrender its jurisdiction*, and if it does, the Circuit Court of the United States can not allow an amendment of the petition, but must remand the case." (Crehore *v.* Ohio & Mississippi Railway Co., 131 U. S., 240, 33:144; Jackson *v.* Allen, 132 U. S., 27, 33:249.)

In Crehore *v.* Ohio & Mississippi R. Co., 131 U. S., 240, this Court, in its opinion by Mr. Justice Harlan, also said:

"It has also been repeatedly held, particularly in Stone *v.* South Carolina, 117 U. S., 430, 432, 29:962, following substantially Baltimore & O. R. Co. *v.* Koontz, that 'A *State Court is not bound* to *surrender its jurisdiction of the suit* on a petition for removal, *until a case has been made which on its face shows that the petitioner had a right to the transfer*;' and that '*The mere filing of a petition for the removal of a suit, which is not removable, does not work a transfer.*' To accomplish this the suit must be one that may be removed, and the *petition must show a right in the petitioner to demand the removal.*"

It therefore follows that the Circuit and Appellate Courts of the State of Kentucky not only had the right to determine from the petition of the defendant in error and the petition for removal, whether any grounds for

removal were presented in either or both petitions, but these Courts were in duty bound to retain jurisdiction of the cause of action and the parties to the controversy, unless the requisite grounds for removal were shown to exist in the record, thus made up in the State Court.

The petition for removal, as we construe it, presents but *one ground for removal* of this cause to the Federal Court, and is based alone upon the "wrongful and fraudulent joinder of the resident defendant, Milligan, for the sole purpose of preventing a removal of this cause to the Federal Court."

There is no averment in the petition that thre is a separable cause of action, within the meaning of the Judiciary Act of March 3, 1887, c 373, 24 Stat., 552 (U. S. Comp. St. 1901, page 508), and for that reason the plaintiff in error might remove the cause to the Federal Court. The ground of separable controversy is not alleged or referred to unless the allegation, "that there is in said suit a controversy wholly between residents of different States, which can be fully determined between them" is broad enough to make it.

But whether the petition be construed to present *one* or *both* of these grounds, or rather we should say attempts to present them, in either state of case, the Kentucky Court of Appeals, but followed the rule of law laid down by this Court in Chesapeake & Ohio Ry. Co. *v.* Dixon, 179 U. S., in affirming the action of the Mercer Circuit Court, in denying the application to transfer this cause to the Federal Court.

This Court in its opinion by Mr. Chief Justice Fuller in the Dixon case, which is on all fours with the case at bar, said:

"The question to be determined is whether the Court of Appeals of Kentucky erred in affirming the action of the Boyd Circuit Court in denying the application to remove. And that depends on whether a separable controversy appeared on the face of plaintiff's petition or declaration. If the liability of defendants, as set forth in that pleading, *was joint*, and *the cause of action entire, then the controversy was not separable as a matter of law*, and plaintiff's *purpose in joining Chalkey* and *Sidles was immaterial*. The petition for removal did not charge fraud in that regard, or set up any facts and circumstances indicative thereof, and plaintiff's motive in the performance of a lawful act was not open to inquiry."

After quoting section 241 of the Kentucky Constitution and section 6 of the Kentucky Statutes, already quoted in our brief, the Court further said:

"The *cause of action thus created* is independent of any right of action the deceased may have had or would have had if he had survived the injury, and *in this case the Court of Appeals held that the company* and *its engineer* and *fireman were jointly liable for Dixon's death if caused by the negligence of those employees*, and *that the cause of action as alleged against all the defendants was an entire cause of action.*"

The Court of Appeals also held in this case that the company and its engineer, Milligan, *are jointly liable for*

Cook's death, if caused by the negligence of the company's engineer, and *that the cause of action alleged against them is entire.*

In construing Section 6 of the Kenucky statutes in Illinois Central Ry. Co. *v.* Winston's Admr., 111th Ky., page 954, the Kentucky Court of Appeals said:

"By the terms of this section, where death results from the negligent act, a recovery may be had therefor against the person or persons, company or companies, corporation or corporations, their agents or servants, causing the same. * * * The plaintiff has a right to proceed severally or jointly against those who are liable for the injury inflicted resulting in death."

In McCabe's Admx. *v.* M. & B. S. R. R. Co., 112 Ky., 861, the Kentucky Court of Appeals said:

"The common law distinctions between the different forms of action have been abolished by our Code of Practice, and *all persons who are liable for a wrong may now be sued jointly in this State in an act to recover for negligence.*"

In the Dixon case Mr. Chief Justice Fuller said:

"Plymouth Gold Min. Co. *v.* Amandor & S. Canal Co., 118 U. S., 264, 30, L. ed., 232, 6 Sup. Ct. Rep., 1034, and Cornell *v.* Utica, N. & E. R. R. Co., 13 Fed. Rep., 241, are more in point on the precise question sought to be raised and in the latter case Mr. Justice Blatchford expressed the opinion, that it was proper for the Federal Courts to *follow the decisions of the State Courts that a cause of action was entire.*"

Under the constitution and the statutes of Kentucky and the decisions of that State the company and its engineer, Milligan, are jointly liable for the negligent act resulting in Cook's death, and the cause of action is entire.

In the Dixon case Mr. Chief Justice Fuller, after quoting from Duncan *v.* Findlater, 6 Clark & F. 894-910; and Barton's Hill Coal Co. *v.* Reid, 3 Macq. H. L, Cas. 283, and Farewell *v.* Boston & W. R. Co., 4 Met. 49, 38 Am. Dec., 339, and Pollock on Torts (Am. ed. 89–90) said:

"Whatever its sources or the principles on which it rests, the rule itself is firmly established and many courts have held the identification of master and servant to be so complete that *the liability of both may be enforced in the same action*, although other courts have reached the opposite conclusion. * * * In respect to the removal of actions of tort on the ground of separable controversy certain matters must be regarded as not open to dispute. In Powers *v.* Chesapeake & O. R. Co., 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 264, it was said:

"It *is well settled that an action of tort which might have been brought against many persons*, or *against any one* or *more of them*, and *which is brought in a State court against all jointly, contains no separate controversy, which will authorize its removal by some of the defendants into the Circuit Court of the United States*, even if they file separate answers and set up different defenses from the other defendants, and *allege* that *they are not jointly liable with them*, and *that*

their own controversy with the plaintiff is a separate one, for as this court has often said, a *defendant has no right to say that an action shall be several which the* plaintiff *seeks to make joint.* A separate defense may defeat a joint recovery, but *it can not deprive a plaintiff of his right to prosecute his suit to final decision in his own way.* The *cause of action is the subject matter of the controversy,* and that is, for all the purposes of the suit, *whatever the plaintiff declares it to be in his pleadings.*" Pirie *v.* Tvedt, 115 U. S. 41, 43, 29 L. ed. 331, 332, 5 Sup. Ct. Rep. 1034, 1161; Sloane *v.* Anderson, 117 U. S. 275, 29 L. ed. 899, 6th Sup. Ct. Rep. 730; Little *v.* Giles, 118 U. S. 596, 600–601, 30 L. ed. 269, 270, 271, 7th Sup. Ct. Rep. 32; Louisville & N. R. Co. *v.* Wanglen, 132 U. S. 599, 33 L. ed. 474, 10 Sup. Ct. Rep. 203; Torrence *v.* Shedd, 144 U. S. 527, 530, 36 L. ed. 528, 531, 12 Sup. Ct. Rep. 726; Connel *v.* Smiley, 156 U. S. 335, 340, 39 L. ed. 443, 445, 15 Sup. Ct. Rep. 353.

In L. & N. R. Co. *v.* Wanglen, 132 U. S. 599, 33 L. ed. 474, 7 Sup. Ct. Rep., 203, Mr. Justice Gray in the opinion of this Court, following the rule in the cases cited in the Dixon case, said:

"It has been *often decided* that an action brought in a State Court against *two jointly for a tort can not be removed by either* of them into the Circuit Court of the United States, under the Act of March 3, 1875, Chap 137, Sec. 2, *upon the ground of separable controversy* between the plaintiff and himself, although the defendants

have pleaded severally and the plaintiff might have brought the action against either alone."

Every averment, necessary to state a cause of action for tort against both the company and its engineer, Milligan, is made in the plaintiff's petition in the State Court. They were both liable for the tort alleged; can be jointly sued and a joint recovery had against them for the tort as alleged in the petition.

The averment of the petition is that " while plaintiff's intestate was engaged as aforesaid on said date, *the defendant, Cincinnati, New Orleans & Texas Pacific Railway Company, and the defendant, Fred Milligan, caught and crushed said Cook's body between the cars of said train, by and through the gross carelessness and negligence of said Milligan as engineer of said defendant company, in the management, movement and operation of its said engine and train at said time and place for said company,* thereby so injuring him that he died within a few moments thereafter, and when so caught and crushed said Cook was engaged in discharging his duties as brakeman to the defendant company; and *said death of said Cook was caused as aforesaid by the gross carelessness and negligence of the defendants, the Cincinnati, New Orleans & Texas Pacific Railway Company and Fred Milligan.*"

These averments stated *an entire cause of action for tort against both the Company and Milligan,* and in the language of Mr. Chief Justice Fuller in the Dixon case, " *manifestly comprised every fact which plaintiff was obliged*

to prove in order to obtain judgment or conversely every fact which defendants would have the right to traverse. Andon the principle of the identification of the master with the servant, it would seem that there was no fact which the company could traverse which its co-defendant, being its employee, could not."

As said in L. & E. Mail Co. *v.* Clara Barnes, admr., 25 Ky. L. Rep., page 2038:

"It is a universal rule of law that joint tort feasors are jointly and severally liable to the injured party. He may sue any one or all at his election, but when he once receives satisfaction for the injury done him from one or more of the tort feasors, he is barred from proceeding against the other joint tort feasors. This is upon the idea that he is only entitled to one satisfaction and to avoid his getting more than one compensation for his injury. There are authorities in many states, which hold that any satisfaction from and a release of one joint tort feason, releases all."

In electing, as he had a right to do, to proceed against them both, for the negligent act, resulting in the death of Cook, *the cause of action stated against them in his petition* became the subject matter of the controversy, and made both the *Company* and *Milligan liable* in damages, under the constitution and statutes of Kentucky.

There is stated in the petition but a *single cause of action* against two defendants who are jointly liable for the tort. And in the language of Mr. Chief Justice Fuller in the Dixon case, "if *the liability* of the Defend-

ants *as set forth in that pleading was joint* and the *cause of action entire* then the *controversy is* not *separable* as a matter of law."

In commenting on the Removal Acts of 1875 and 1887, in Chicago, Rock Island & Pacific Ry. Co. *v.* Lina Martin, Admx., Supreme Court Reporter, Vol. 20, page 854, Mr. Chief Justice Fuller said:

"And so as to the second clause of the second section of the act of 1875, which corresponds with the third clause of the second section of the act of 1887, it was held that that clause only applied, *when there were two or more controversies in the same suit, one of which is wholly between citizens of different States.* Hannick *v.* Hannick, 153 U. S., 192, 38 L. Ed. 685, 14th. Supreme Court Reporter and cases cited."

We therefore respectfully insist that the two clauses of the Acts of 1875 and 1887 have no application to a suit like the one now before the Court, for the reason that there is but one cause of action, which is the subject matter of the controversy, stated in the petition against the Company and Milligan, and the controversy is not wholly between the Company and the Defendant in Error.

As late as April, 1904, in Southern Railway Co. *v.* Carson, 194 U. S., 142, L. Ed. 907, the Court in its opinion by Mr. Chief Justice Fuller, adheres to the rule in the Powers and Dixon cases, and cases therein cited, and thus repeats it:

"The right of removal depends upon the act of Con-

gress and the company not only on the face of the pleadings did not come within the act, but it made no effort to assert the right. The rule is well settled as stated by Mr. Justice Gray in Powers *v.* Chesapeake & O. R. Co., 169 U. S., 92, 42 L. Ed., 673, 18 Sup. Ct. Rep., 264, 'that an action of tort which might have been brought against many persons or against any one or more of them, and which is brought in a State Court against all jointly contains no separate controversy, which will authorize its removal by some of the defendants into the Circuit Court of the United States, even if they file separate answers and set up different defenses from the other defendants and allege that they are not jointly liable with them, and that their own controversy with the plaintiff is a separate one; for as this Court has often said a defendant has no right to say that an action shall be several which the plaintiff seeks to make joint. A separate defense may defeat a joint recovery, but it can not deprive a plaintiff of his right to prosecute his suit for final decision in his own way. The cause of action is the subject-matter of the controversy and that is for all purposes of the suit whatever the plaintiff declares it to be in his pleadings".

After thus quoting from the Powers case the Court further said, in the Carson case:

"The view thus expressed was reiterated in Chesapeake & Ohio R. Co. *v.* Dixon, 179 U. S., 131, 45 L. Ed., 121, 21 Sup. Ct. Rep., 67, where the subject was much considered and cases cited. Reference was there made to the fact

that many courts have held the identification of master and servant to be so complete that the liability of both may be enforced in the same action. Shumpert *v.* Southern R. Co., 65 S. C., 332, 95 Am. St. Rep., 802, 43 S. E. 818. In that case it was held that under the State Code of Civil Procedure in actions *ex delicto* acts of negligence and willful tort might be commingled in one statement as causing the injury; that master and servant are jointly liable as joint tort feasors for the tort of the servant committed within the scope of his employment and while in the master's service."

We therefore respectfully submit that no ground of separable controversy is shown in the record of this case which would authorize the plaintiff in error to have a removal of it into the United States Court upon the ground of separable controversy.

It is equally as clear from the ruling in the Dixon, Carson and Powers cases applied to the petition for removal and the record in the Mercer Circuit Court, that the defendant in error has not been guilty of any wrongful or fraudulent act or conduct in joining Milligan as a co-defendant with the Company in this suit. In doing so he exercised nothing more than a lawful right given to him under the Constitution and Statutes of the State of Kentucky. There is not a single fact or circumstance indicative of fraud or wrongful act on his part, alleged in the petition for removal, nor is there a line of proof of fraud or wrongful act in the record. As ruled in the Dixon and Wanglin cases it is necessary to *both* allege

and *prove* fraud to make out the ground of fraudulent joinder. The plaintiff in error has done neither, and this Court in the Dixon case has expressly said that the defendant in error's motive in the performance of a lawful act is not open to inquiry. Hence it seems to us manifest upon the authority of the cases quoted in this brief that the Kentucky Court of Appeals committed no error in affirming the action of the Mercer Circuit Court in refusing to transfer this case to the United States Court.

We respectfully ask an affirmance of the judgment of the Kentucky Court of Appeals.

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